



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

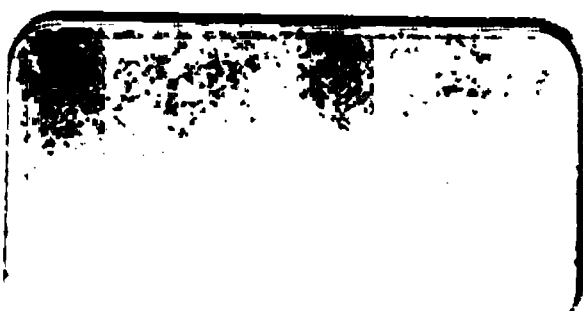
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



Mr Justice Field

with the Compliments of

A. L. Bancroft & Co.

San Francisco }
April 11. 1873. }

11. 11. 11.

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

1000

[illegible]

11/11/11

REPORTS OF CASES
DECIDED IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES, Circuit Court,
(9th circuit)
FOR THE
NINTH CIRCUIT.

EMBRACING CASES AT LAW, CIVIL AND CRIMINAL, IN EQUITY,
ADMIRALTY AND BANKRUPTCY, AND CASES ON APPEAL
FROM THE AMERICAN CONSULAR AND MINIS-
TERIAL COURTS IN CHINA AND JAPAN.

REPORTED BY
L. S. B. SAWYER,
COUNSELOR AT LAW.

VOLUME I.

SAN FRANCISCO:
A. L. BANCROFT AND COMPANY,
PUBLISHERS, BOOKSELLERS AND STATIONERS.
1873.

**LIBRARY OF THE
LELAND STANFORD JR. UNIVERSITY.**

A. ~~44020~~ 43120

Entered according to Act of Congress, in the year 1873,

By A. L. BANCROFT & COMPANY,

In the office of the Librarian of Congress, at Washington.

J U D G E S
OF THE
U. S C I R C U I T A N D D I S T R I C T C O U R T S,
FOR THE NINTH CIRCUIT.

HON. STEPHEN J. FIELD,
Justice of the Supreme Court assigned to the Circuit.

HON. LORENZO SAWYER,
Circuit Judge.

DISTRICT JUDGES.

HON. ODGEN HOFFMAN, . . District of California.
HON. MATTHEW P. DEADY, . . District of Oregon.
HON. EDGAR W. HILLYER, . . District of Nevada.

PREFACE.

The Judges of the Circuit and District Courts of the United States for the Ninth Circuit, yielding to a very generally expressed desire of the legal profession in the Circuit, that their decisions should be reported in a regular series, have authorized the undersigned to report such of the numerous decisions rendered as may be supposed to be of a somewhat general and permanent interest to the profession. The series will commence with the reorganization of the Circuit Courts, by the appointment of Circuit Judges, under the Act of Congress of April 10th, 1869.

The extension of the jurisdiction of the National Courts by recent legislation, and the appointment of Circuit Judges, who will be at all times engaged in the discharge of their duties on the Circuit, has tended to largely increase the business of these Courts. Many legal propositions of great interest and importance are discussed in the decisions now being rendered in the United States Circuit and District Courts, and no Circuit is likely to present a greater number of new and important questions of lasting interest, than the Ninth.

The reports now commenced will embrace cases at law, Civil and Criminal; cases in Equity, Admiralty, and Bankruptcy; and special cases arising under Acts of Congress.

The Circuit Court for the District of California, in addition to its ordinary jurisdiction, has, also, the new and final appellate jurisdiction from the United States Consular and Ministerial Courts in China and Japan, in the exercise of which novel and interesting questions for adjudication are likely to arise. This volume contains the first case brought to the Circuit Court from the Consular Court at Canton, in the Empire of China.

Should the demand for the present volume indicate that it supplies a want to the profession, the series will be continued.

L. S. B. SAWYER.

San Francisco, March, 1873.

ERRATA.

On page 171, line 19, after "give," insert "it to."

On page 343, end of second line of syllabus, for "bankrupt," read "Court."

On page 377, line 16, for "lawful," read "unlawful."

On page 509, line 24, for "does," read "do."

On page 519, in last entire line of third paragraph, for "affixing," read "fixing."

On page 555, in first line of third paragraph from bottom, for "was," read "were."

On page 658, first word in last line *out*.

TABLE OF CASES REPORTED.

A.

	Page.
Adams v. Meyers	306

B.

Bachman v. Everding	70
Baker, Carter v	512
Barney, Parrott v	423
Bevans, Montgomery v	653 +
Bissell v. Henshaw	553
Bowman, Haggett v	4
Brown, United States v	531
Burbank, Lamb v	227

C.

California, The	463
California, The	596
Campbell, McKay v	374
Carter <i>et al.</i> , Lamb v	212
Carter v. Baker	512
Catlin, Assignee, v. Currier	7
Catlin, Assignee, v. Foster	37
Central Pacific Railroad Co. v. Dyer	641
Chabolla, Le Roy v	457
Chappelle v. Olney	401
— Cole Silver Mining Company v. Virginia & Gold Hill Water Company	470 +
— Cole Silver Mining Company v. Virginia & Gold Hill Water Company	685
Connell, Fitch v	156
Currier, Catlin, Assignee, v	7

D.

Davis, <i>In re</i>	260
Davenport, Lamb v	609
— Dyer, Central Pacific Railroad Co. v	641 +

E.

	Page.
Everding, Bachman <i>v</i>	70
Elder, <i>In re</i>	73

F.

Fideliter, The.....	153
Fitch <i>v</i> . Connell.....	156
Fogarty <i>v</i> . Gerrity.....	233
Foster, Catlin, Assignee, <i>v</i>	37
Four Hundred and Sixty-Seven Bars R. R. Iron, Harley <i>v</i> . ..	1
Fowle, Hanson <i>v</i>	497
Fowle, Hanson <i>v</i>	539
Francis <i>v</i> . The Barque Harrison.....	353
Fuller, <i>In re</i>	243
Funkenstein, United States <i>v</i>	188

G.

Gage, Yellow Jacket Silver Mining Co. <i>v</i>	494
Gallinger, <i>In re</i>	224
Galpin <i>v</i> . Page.....	309
Garcia, United States <i>v</i>	383
Gerrity, Fogarty <i>v</i>	233
+ German Savings and Loan Society <i>v</i> . Oulton.....	695
Ghirardelli, <i>In re</i>	343
Goodrich <i>v</i> . The Barque Domingo.....	182

H.

Haggett <i>v</i> . Bowman.....	4
Hanson <i>v</i> . Fowle.....	497
Hanson <i>v</i> . Fowle.....	539
Harbin, Hardy <i>v</i>	194
Harley <i>v</i> . Four Hundred and Sixty-Seven Bars of Iron.....	1
Hardy <i>v</i> . Harbin.....	194
Henshaw, Bissell <i>v</i>	553
Hill, Zeiber <i>v</i>	268
Holmes <i>v</i> . Holmes.....	99
Holmes, Holmes <i>v</i>	99
Hope Mining Co., <i>In re</i>	710
Howard, United States <i>v</i>	507
Hyde <i>v</i> . Sontag.....	249

I.

<i>In re</i> The California.....	462
<i>In re</i> The California.....	596

TABLE OF CASES.

xi

	Page
<i>In re Davis</i>	260
<i>In re Elder</i>	73
<i>In re Fuller</i>	243
<i>In re Gallinger</i>	224
<i>In re Ghirardelli</i>	343
<i>In re Hope Mining Co</i>	710
<i>In re Lady Bryan Co</i>	349
<i>In re Mallory</i>	88
<i>In re Ouimette</i>	47
<i>In re Randall and Sunderland</i>	56
<i>In re Stevens</i>	397
<i>In re Silverman</i>	410
<i>In re Strouse</i>	605

J.

<i>Johnson v. The Barque Cyane</i>	150
--	-----

K.

<i>Kamm, Lamb v</i>	239
<i>Kamm v. Stark</i>	547

L.

<i>Lady Bryan Co., In re</i>	349
<i>Lamb v. Burbank</i>	227
<i>Lamb v. Carter</i>	212
<i>Lamb v. Davenport</i>	609
<i>Lamb v. Kamm</i>	239
<i>Lamb v. Wakefield</i>	251
<i>Larco v. Schooner Martha and Elizabeth</i>	129
<i>Le Roy v. Chabolla</i>	457
<i>Lee Choi Chum, Steamer Spark, v</i>	713

M.

<i>Mallory In re</i>	88
<i>Manciette, Norman v</i>	484
<i>Mary Bell, The</i>	135
<i>Mathoit, United States v</i>	142
<i>McKay v. Campbell</i>	374
<i>Meyers, Adams v</i>	306
<i>Morrison v. Steamboat Petaluma</i>	126
<i>Montgomery v. Bevans</i>	653

N.

<i>Newby v. Oregon Central Railroad Co</i>	63
<i>Norman v. Manciette</i>	484

O.

	Page.
Olney, Chappelle <i>v</i>	401
Oregon Central R. R. Co., Newby <i>v</i>	63
Oriflamme, The	176
Ouimette, <i>In re</i>	47
Oulton, German Savings & Loan Society <i>v</i>	695

P.

Page, Galpin <i>v</i>	309
Page, Spaulding <i>v</i>	702
Parrott <i>v</i> . Barney	423
Pico, United States <i>v</i>	347

R.

Randall and Sunderland, <i>In re</i>	56
Robinson, United States <i>v</i>	219

S.

Schooner Martha and Elizabeth, Larco <i>v</i>	129
Scully <i>v</i> . Steamer Great Republic	31
Silverman, <i>In re</i>	410
Smith, United States <i>v</i>	192
Smith, United States <i>v</i>	277
Somerville <i>v</i> . The Brig Francisco	391
Sontag, Hyde <i>v</i>	249
Spreckens, United States <i>v</i>	84
Spaulding <i>v</i> . Page	702
Stark <i>v</i> . Starr	15
Stark, Starr <i>v</i>	270
Stark, Kamm <i>v</i>	547
Starr, Stark <i>v</i>	15
Starr <i>v</i> . Stark	270
Steamboat Petaluma, Morrison <i>v</i>	126
Steamer Great Republic, Scully <i>v</i>	31
Steamer Spark <i>v</i> . Lee Choi Chum	713
Stevens, <i>In re</i>	397
Strouse, <i>In re</i>	605

T.

The Barque Cyane, Johnson <i>v</i>	150
The Barque Domingo, Goodrich <i>v</i>	182
The Barque Harrison, Francis <i>v</i>	353
The Brig Francisco, Somerville <i>v</i>	391

TABLE OF CASES.

xiii

	Page.
The California.....	463
The California.....	596
The Fideliter.....	153
The Mary Bell.....	135
The Oriflamme.....	176

U.

United States v. Brown.....	531
United States v. Garcia.....	383
United States v. Howard.....	507
United States v. Mathoit.....	142
United States v. Pico.....	347
United States v. Robinson.....	219
United States v. Smith.....	192
United States v. Smith.....	277
United States v. Spreckens.....	84
United States v. 133 Casks Distilled Spirits.....	188
United States v. The Fideliter.....	153
United States v. Waller.....	701

V.

Virginia & Gold Hill Water Co., Cole Silver Min. Co. v....	470
Virginia & Gold Hill Water Co., Cole Silver Min. Co. v....	685

W.

Wakefield, Lamb v.....	251
Waller, United States v.....	701

Y.

Yellow Jacket Silver Mining Co. v. Gage.....	494
--	-----

Z.

Zeiber v. Hill.....	268
---------------------	-----

DECISIONS
OF THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES, FOR THE NINTH CIRCUIT.

CHARLES HARLEY *et al.* v. FOUR HUNDRED AND
SIXTY-SEVEN BARS RAILROAD IRON, ETC.

DISTRICT COURT, DISTRICT OF CALIFORNIA,
JANUARY 6, 1870.

1. SALVAGE CONTRACT BY MASTER SUSTAINED.—A contract made by the master with salvors, for the recovery of the cargo of a sunken vessel, sustained.
2. ADDITIONAL COMPENSATION REFUSED.

Before HOFFMAN, District Judge.

McAllisters & Bergin, Proctors for libellants.

Samuel M. Wilson, Proctor for claimants.

HOFFMAN, J. There can be no question that the vessel and property saved were in a condition to be the subject of a salvage service.

The vessel had foundered, and had sunk with her cargo to the bottom of the bay. (*The Reward*, 1 Wm. Rob. 174; *The Princess Alice*, 3 Wm. Rob. 158; *The Emulous*, 1 Sumn. 207, 1 Story, 314; *The Centunoa*, Wells R. 482.)

Nor does the fact that a contract was made, stipulating for the rate of compensation, to be paid in the event of and proportionate to the degree of success, affect the character of a salvage service.

Parties may agree on the amount of a salvage compensation, or on the principles upon which it shall be adjusted, and such agreements, if fairly made, and no advantage be taken of ignorance or distress, are readily upheld by the Courts. (*The Independence*, 2 Curtis' R. 357; *The Emulous*, 1 Sumn. 207; *Bearse v. Pigs Copper*, 1 Story, 314; *The A. D. Patchin*, 1 Blatf. 414; *The True Blue*, 2 Wm. Rob. 176; *The Harry*, 2 Eng. L. & Eq. 564.)

It is claimed by the salvors that their agreement was made under a misrepresentation of the facts, and that the service was more arduous and expensive than they had a right to anticipate.

But it does not appear that any willful misrepresentation was made to them as to the position of the vessel. The precise depth of water in which she lay, and especially her position on the bottom in water twenty-five or thirty feet deep, were necessarily matters of conjecture, and the libellants, before entering into their contract, might have visited the wreck, ascertained its position, and estimated the chances and probable expense of the service.

Had she been found in shallower water, or more favorably situated than they supposed, they would hardly have consented to an abatement of the contract price. They cannot now demand an enhancement of it because the contrary has proved to be the case.

But, even if the contract could be set aside, the libellants would thereby gain no advantage. Besides the railroad iron libelled in this case, the vessel herself was also saved, and restored to her owners. The saving of vessel and cargo constituted but one transaction—the former being dependent, to a great degree, on the previous success of the latter.

If the contract be set aside, the salvors will be entitled to a just compensation for the whole service to be paid by the owners of the vessel and cargo, in proportion to their respective interests. In that case they could only recover in this action the proportionate share of the total reward due from the cargo which has been libelled. This would certainly not exceed the amount agreed in the contract to be paid.

If, in this case, it had appeared that the master of the ves-

1870

Opinion of the Court—Hoffman, J.

sel had used the powers entrusted to him, to enter into an agreement by which the whole cost of saving both cargo and vessel should be thrown upon the owners of the former, and the vessel restored to her owners substantially without charge, I should not hesitate, notwithstanding that the master has a general authority to enter into contracts of this description, to pronounce the contract void, and not made in the execution of the master's duty to act fairly and impartially for the best interests of all concerned—the owners of the cargo as well as the vessel.

But I do not find any evidence that the amount of salvage agreed to be given was excessive, or beyond what might reasonably have been demanded if the saving of the cargo had been the sole object of the salvors' exertions.

The proofs show that in point of fact the salvors' compensation will not cover their expenses, or at best will leave them but a slight and insufficient compensation.

I am not prepared to say, that if their reward were to be estimated upon the aggregate value of cargo and vessel, the share due from the former would be less than the compensation stipulated for in the contract.

Had the owners of the cargo, on being apprised of the disaster, revoked the master's authority to contract for its salvage, and notified the proposed salvors that they would themselves undertake its recovery, and would not be bound by any agreements entered into by the master, the case might have been different. But no such steps were taken, and the salvors were permitted to undertake the service, incur large expenses, and encounter the risks of failure, without opposition or objection on the part of the owners of the cargo. I am also inclined to think, that had the latter undertaken the service, it would have been found nearly or quite as expensive as under the contract. But this, as I am not informed what were the means of effecting the service at the disposal of the owners of the cargo, is merely a conjecture.

Under all the circumstances, my opinion is that the libellants are entitled to recover the compensation agreed upon in their contract, and no more.

As there seems to be some misunderstanding or confusion

as to the precise number of tons of iron saved and delivered to the owners by them, a reference to ascertain that number may be taken, or the advocates of the respective parties may appear before the Judge in chambers, and establish the facts.

THOMAS HAGGETT v. J. W. BOWMAN *et al.*

DISTRICT COURT, DISTRICT OF CALIFORNIA.

JANUARY 10, 1870.

1. MASTER—ERROR IN JUDGMENT OF.—An error in judgment on the part of a master not shown to be incompetent in respect to the navigation of the vessel, will not render the owners liable for its consequences.
2. INSUFFICIENCY OF TACKLE AND APPAREL.—A deduction from the monthly hire will be made, where the voyage has been protracted by reason of the insufficiency of the sails, etc.

Before HOFFMAN, District Judge.

Pixley & Harrison, Proctors for libellant.

James McCabe, Proctor for claimants.

HOFFMAN, J. This is an action brought by the master to recover the monthly hire of the vessel of which libellant was master, as stipulated by charter party.

The execution of the charter party is not denied. The defense set up is that the master was incompetent, that he unnecessarily delayed the voyage, thereby defeating its objects, and that the sails of the vessel were old, and unfit for use. It is not pretended that the master willfully attempted to thwart the designs of the charterers. They appear to have been engaged in a somewhat undefined enterprise, of which the principal objects were to trade with the natives of Alaska, and to search for mines or mineral lodes.

That the voyage, both going and returning, was unusually long is evident. But it is far from clear that this was owing to the fault of the libellant. The expedition appears to

1870.]

Opinion of the Court—Hoffman J.

have been very imperfectly organized, and, as Lew, the steward, expresses it, there was “neither head nor tail to the vessel’s management.”

Capt. Bowman, who was in charge of the expedition, seems also to have had more or less share in the navigation of the vessel.

Mr. Lew states that there was a good deal of talk and disturbance and jarring among the crew, but he cannot say that it was caused by Capt. Haggett more than any one else. There was evidently more time consumed in reaching the point for which they started, than would have been necessary if the vessel had taken the proper course, but this Mr. Lew declines to attribute to the fault of Capt. Haggett, as no observation had been taken for three days, and no reckoning obtained. Some difference of opinion existed as to the propriety of going close in to the shore, anchoring, etc. But these matters may, I think, be considered as left to the master’s discretion. He appears to have been interested in the adventure. He is acquitted of all intention to frustrate its objects, or impede the operations of his associates, and even if he did commit an error of judgment, and was as Capt. Bowman says, “too much afraid of the land,” that circumstance affords no reason why the charterers should not pay the stipulated sum for the hire of the vessel.

It has seemed to me that the respondents are attempting to attribute to the fault of the libellant the failure of an enterprise, the want of success of which was due to other causes.

It is established beyond controversy, that the sails were old, and required continual repairs.

Mr. Lew states that this caused danger, delay and much inconvenience.

So far as I can gather from the terms of this very artificially drawn charter party, the hirers of the vessel were to furnish a full crew, provisions, and utensils for the voyage, and to pay all port charges and other expenses that might accrue on the voyage and fitting out of the vessel.

The libellant has presented a claim for various expenses incurred by him. I hardly think it could have been intended by the parties, that anchors, flags, and other articles neces-

Opinion of the Court--Hoffman, J.

[January,

sary to the vessel, and which still remain on board as part of her apparel, furniture, and appurtenances, should be paid for by the hirers and retained by the master.

The sums paid for these articles should, therefore, be deducted from the account by the master.

I think, too, that the condition of the sails, to some extent, protracted the voyage, and as the vessel was hired by the month a deduction should be made on that account.

The whole time during which she was engaged in the service was three months and nine days, at the rate of \$150 per month.

The bill of Wright & Bowne, sworn to as correct by the master, is \$143.44.

From this should be deducted, for anchor, etc . . .	29.10
For side lights, (lanterns)	21.50
For hand leads and line	4.75
	<hr/>
	\$55.35

The bill for custom-house fees--\$13.50--appears to be properly chargeable to the respondents.

There is also to be deducted \$20, paid to libellant by Mr. Lew on account of his disbursements.

I shall deduct from the monthly hire, otherwise due, the hire for nine days, and allow the libellant \$150 per month for the period of three months \$450.00

For outfit, charges, etc	\$143.44
C. H. fees	13.50

\$256.94

Less for anchor, etc \$55.35

Amount paid by Lew 20.00

\$75.35

\$181.59

Total \$626.59

For which sum, in gold coin, a decree will be entered.

JOHN CATLIN, *Assignee of John A. Daly v.*
WILLIAM CURRIER.

CIRCUIT COURT, DISTRICT OF OREGON.

JANUARY 17, 1870.

1. CHATTEL MORTGAGE—WHEN VOID.—A mortgage of personal property, accompanied by an oral agreement or understanding between the parties thereto, that the property should remain in the possession of the mortgagor, and be disposed of by him in the course of his business, and the proceeds thereof applied to his own use, is a conveyance or assignment of such property in trust for the person making the same, and, therefore, void as against the creditors existing or subsequent of such mortgagor. (Or. Code, 655.)
2. FORECLOSURE—RIGHTS OF THIRD PERSONS.—A decree foreclosing a chattel mortgage does not affect the rights of third persons in the goods mentioned therein.

Before DEADY, District Judge.

THIS action was brought to recover damages for the conversion by the defendant, to his own use, of a stock of hats and hatter's tools, alleged to have belonged to the estate of Daly.

On the trial, the Court, sitting without a jury, found the following facts:

I. That about the month of November, 1866, the defendant being then and ever since engaged in the business of a merchant tailor and clothier at number 103 Front street, Portland, formed a partnership with John A. Daly, a hatter, to carry on the hat business under the firm name of John A. Daly & Co., at the defendant's place of business aforesaid; and that the defendant, at the commencement of said partnership, advanced said firm the sum of \$1,500 in gold coin; and on March 12, 1867, indorsed the note of the firm for the sum of \$1,000 in gold coin, which he afterwards paid with interest to Ladd & Tilton, bankers, at Portland.

II. That Daly expended the \$1,500 aforesaid, in the purchase of stock for the firm, and at the same time obtained about \$2,500 worth of stock on credit, and that on December 24, 1867, said firm, by agreement of the parties thereto, was dissolved, and the stock of goods and fixtures on hand

Statement of Facts.

[January,

were turned over to Daly, who was to continue the business on his own account at the same place.

III. That the business of Daly & Co. yielded no profits, nor did the defendant receive any money from it as profits or otherwise, but that Daly during the existence of the firm drew out of the business from \$50 to \$75 per month for his support. That at the date of the dissolution aforesaid Daly & Co. were owing the defendant the sum of \$2,546 in gold coin, for money advanced and paid by the defendant as aforesaid, for which sum Daly then gave his promissory note, payable on demand to the defendant or order, with interest at one per centum per month, to secure the payment of which note, Daly at the same time executed a mortgage to the defendant upon the stock and fixtures of the hat business aforesaid, then being and to remain at 103 Front street aforesaid, with condition that the same should be void upon the payment of \$2,546 in gold coin, on or before December 24, 1868, with interest at the rate of one per centum per month; that the mortgage further provided that if default should be made in the payment of the principal sum, or any installment of the interest thereon, then the mortgagee was empowered to take the goods into his possession and sell the same by due process of law, or by agreement of the parties, and out of the money arising therefrom to pay the debt, interest, charges, etc., and until default be made as aforesaid, the mortgagor, or his assignees, were to remain in the possession of the goods and in the full and free use and enjoyment of the same.

IV. That the mortgage aforesaid was duly filed in the County Clerk's office of the proper county on December 27, 1867, but no affidavit was ever made or filed by the mortgagee, therein setting forth his interest in the mortgaged property. That Daly made default and failed to pay the principal sum mentioned in such mortgage and the installments of interest thereon, or any part thereof, although requested so to do, whereupon the defendant on or about November 25, 1868, took possession of all the stock and fixtures then in the possession of Daly, at number 103 Front street aforesaid.

V. That at the execution of the mortgage aforesaid it was

1870.]

Statement of Facts.

orally agreed and understood between the parties thereto, that, notwithstanding said mortgage, Daly might dispose of the stock of goods in the course of his business, and that any new or additional stock which Daly might purchase to supply the place of that so sold, should be bound by and included within the terms and operation of said mortgage, and that in pursuance of such oral agreement, Daly sold from the original stock and added thereto by purchase; that when the stock was turned over to Currier as aforesaid, there was remaining on hand of the goods mentioned in the mortgage what was equal in value to \$700 in gold coin, and of the fixtures so mentioned, what was equal in value to \$100 in gold coin, and of goods that had been added by Daly to the original mortgaged stock what was equal in value to \$975 in gold coin.

VI. That on December 19, 1868, Daly was, by the District Court for the district aforesaid, duly adjudged a bankrupt upon the petition of his creditors, and that on January 13, 1869, the plaintiff, being then duly qualified as assignee of the estate of the said Daly, duly demanded of the defendant the property above mentioned, whereupon the defendant delivered to the plaintiff all that part of the goods in his possession which had been purchased by Daly since the execution of the mortgage; but as to the goods and fixtures then in his possession, and included and mentioned in said mortgage, the same being of the value of \$800 in gold coin, the defendant refused to deliver the same to the plaintiff, but retained the same as his own property, under and by virtue of the mortgage, and the default of Daly in not performing the conditions therein.

VII. That the defendant withdrew from the firm of Daly & Co., and transferred his interest in the stock and fixtures thereof, and received the mortgage as aforesaid, without any fraudulent intent, and without any intent to hinder, delay or defraud the creditors of him, the said Daly, but for the purpose of protecting his own interest and securing his debt.

VIII. That on December 1, 1868, defendant commenced a suit in the Circuit Court, for the county of Multnomah, to foreclose the mortgage aforesaid, and that on January 2, 1869, for want of an answer by the only defendant in said

Statement of Facts.

[January,

suit, the said Daly, said Circuit Court adjudged and decreed among other things, that the lien of said mortgage be foreclosed, and that the property mentioned therein be sold as by law provided, to satisfy the debt aforesaid, due from said Daly to said Currier, but that no sale appears to have been made of such property or any part thereof, by virtue of or in pursuance of such decree or otherwise.

IX. That the decree aforesaid recites that the summons and copy of the complaint in such suit had been duly served upon the defendant therein, and that the time for answering such complaint had expired, whereas it appears from the original summons in such suit that the same was served by a person specially appointed by the proper Sheriff to serve the same; but that the return of such person as to making such service is not proven by his affidavit, or otherwise than by his mere certificate.

And the Court being then unadvised as to what conclusion of law should be drawn from the premises, directed the matter to be argued by counsel, after which the following conclusions of law were found:

I. That the writing executed by Daly on December 24, 1867, purporting to be a mortgage of a certain stock of goods and fixtures to the defendant herein, taken in connection with the contemporaneous oral agreement of said Daly and defendant as set forth in the findings of fact aforesaid, was and is a valid mortgage of said fixtures, but was and is not a mortgage of said stock of goods, but a conveyance or assignment by said Daly of the same to said defendant, in trust for the use and benefit of said Daly, and therefore was and is void and of no effect, as to said stock of goods, as against the plaintiff herein.

II. That the goods and fixtures aforesaid never having been seized or sold under the decree purporting to foreclose the mortgage thereon, the title thereto nor the rights of the parties to this action, therein, were and are in no way affected thereby, and therefore it is immaterial whether such decree was given before or after the commencement of the proceedings in bankruptcy against Daly, or whether or not the same is void for want of a sufficient proof of the service of the summons upon said Daly, or whether or not the same

1870.]

Opinion of the Court—Dady, J.

was obtained after the demand of the plaintiff herein for the possession of the property.

III. That the defendant herein, wrongfully converted to his own use the goods aforesaid of the value of \$700, aforesaid, by refusing to deliver the same to the plaintiff herein when duly demanded thereto, wherefore the plaintiff is entitled to recover off and from said defendant the value of said goods so converted to his own use as aforesaid.

J. W. Whalley and M. W. Fechheimer, for plaintiff.

Lansing Stout and John H. Reed, for defendant.

DEADY, J. The material question in this case is involved in the first conclusion of law stated in the findings of the Court. Is the writing executed by Daly to the defendant, purporting to mortgage to the latter certain goods, when taken in connection with the contemporaneous oral agreement and understanding of the parties, a simple mortgage or a conveyance or transfer of the property in question, in trust, for the use and benefit of Daly, and therefore void as against creditors?

This question does not arise under any provision of the Bankrupt Act. While there is some reason for supposing that Daly was insolvent when he executed the so-called mortgage to the defendant, yet there is nothing in the case to show that he owed any other debts than the one due the defendant. Under these circumstances, even if Daly was insolvent, it could not be said that the writing was either executed or received, with an intention to give or receive a preference, or to hinder or delay existing creditors, or to evade or defeat any provisions of the Bankrupt Act.

The question therefore turns upon the statute of the State and the general principles of law applicable to such a transaction. By the former it is declared that a mortgage of personal property unaccompanied by immediate possession creates a disputable presumption of fraud as against the creditors of the mortgagor, unless the same is duly filed or recorded as provided by law (Or. Code, 339); and also that all conveyances and transfers of goods and chattels, in trust for the person making the same, shall be void as against

the creditors, existing or subsequent of such person. (Or. Code, 655.)

A chattel mortgage is a pledge of personal property as a security for the performance of some act—such as the payment of an existing debt. The law allows the property pledged to remain in the possession of the mortgagor if the mortgage is put on record as notice to the world. But if the mortgage be also coupled with a condition or agreement that the mortgagor may treat the goods as if he were the owner of them—may sell them at his option and receive the proceeds to his own use—such condition or agreement avoids the mortgage. The two cannot stand together. Such use of the mortgaged property by the mortgagor is utterly inconsistent with the idea of giving a pledge or security to the mortgagee. In legal effect it is a sham, a nullity—a mere shadow of a mortgage, only calculated to ward off other creditors—a conveyance in trust for the benefit of the person making it, and therefore void as against creditors.

In this case, it is shown by the finding of the Court (and the testimony of the defendant was clear and unequivocal upon that point) that by the understanding between the defendant and Daly, the latter was to continue, not only in the possession of the goods, but to sell and dispose of them in the course of his business, at his option, and take the proceeds to his own use—and so he did with the knowledge and consent of the defendant until the defendant took possession near the close of the year 1868. As against the other creditors of the bankrupt, the defendant cannot claim anything in this property by such a transaction. In *re Manly* (2 Law Times B. R. 89), decided by Mr. Justice Leavitt of the Southern District of Ohio, is a case on all fours with the one under consideration, and there the mortgage was held void as to creditors.

The case of *Godchaux et al. v. Mulford et al.* (26 Cal. 316), cited by counsel for defendant, is not in point. In that case it was held, that in all mortgages of goods and chattels, whether accompanied by possession or not, there is a trust created in favor of the mortgagor, as to the surplus, if any, and that the statute of frauds which declares all transfers of goods made in trust for the party making the same, to be

1870.]

Opinion of the Court—Deady. J.

void as to creditors, does not apply to such a trust. That the trust as to the surplus is not the object of the transfer, but a mere incident, and does not bring the transaction within the purview of the statute. But in the case at bar, the trust created was something more than a mere legal implication that the surplus, if any, after paying the debt of the defendant, should be held by him for the benefit of Daly. As has been shown, it was an express agreement that notwithstanding the mortgage to the defendant, Daly might proceed to dispose of the goods as his own and receive the proceeds to his own use. This was an express trust in favor of Daly, as to all the mortgaged goods, which rendered the mortgage itself totally inoperative, so long as the goods were allowed to remain in Daly's possession. As the mortgage became forfeited within a month from its execution, for the want of payment of the first installment of interest on the debt, it was in the power of the defendant to have terminated this trust at any time thereafter, by taking the goods into his own possession. But he saw proper to leave them with Daly, with the power to use and dispose of them as his own, and now the law and good morals agree that the defendant should not be preferred to other creditors, who, it may be, trusted Daly upon the faith of this unqualified possession and apparent absolute ownership.

But it is said by the counsel for defendant, that the question of "fraudulent intent" under the statute is a question of fact (Or. Code, 657), and that, as the Court has found as a matter of fact that the defendant acted in the premises without any intent to defraud any one, the only conclusion of law proper to be drawn from the facts is in favor of the validity of the mortgage.

This argument, it seems to me, is based upon two erroneous assumptions. *First*, That the fraudulent intent of which the statute speaks as sufficient to avoid a mortgage is, in any case, the intent of the *mortgagee*; and, *Second*, That the question of "fraudulent intent" is involved in this case at all.

The "fraudulent intent" which by section 52 of the chapter on conveyances (Or. Code, 657) is made a question of fact in all cases arising under titles II, III and IV of that chapter,

is the intent of the grantor or vendor, and not that of the grantee or vendee. It is not found in this case whether Daly, the alleged mortgagor, acted in good faith or not. It is possible that he acted in bad faith, notwithstanding the defendant acted in good faith. But the fact is not material. Nor does section 52 of the chapter on conveyances include the provision of the statute (Or. Code, 339) which furnishes the special rule as to when a sale or assignment or mortgage of personal property is to be deemed fraudulent and void as to creditors, because not accompanied by an immediate delivery and a continued change of possession.

As to the second error of the argument under consideration, it is sufficient to say, that such a mortgage or conveyance as this—a conveyance in trust for the party making it—is declared void as to creditors, as a matter of public policy, without reference to the intent of the parties thereto. The law assumes absolutely, and beyond doubt correctly, that in no circumstances can such a transaction be upheld in justice to creditors. That is this case, and whatever may have been the intention of the parties, the law for the protection of the general creditors of the debtor, declares the so-called mortgage void, because made in trust for Daly.

As to the second conclusion of law, the matter seems too plain for argument. The decree foreclosing the mortgage, at most only extinguished the right of redemption as between Daly and the defendant. There was no seizure or sale of the goods under the decree, and beyond extinguishing the right of redemption, as stated, it had no effect upon the property in the goods, even between the mortgagor and mortgagee. But more than that, the plaintiff was not a party to this decree and the writing upon which it is based, however valid between the parties to it, is void as to the general creditors whom he represents.

There must be a judgment for the plaintiff for the value of the goods.

BENJAMIN STARK v. LEWIS M. STARR.

CIRCUIT COURT, DISTRICT OF OREGON,
FEBRUARY 8, 1870.

1. **EQUITABLE TITLE NO DEFENSE TO ACTION AT LAW.**—An equitable title is no defense to an action for possession by the holder of the legal title.
2. **TOWN SITE ACT NOT IN FORCE PRIOR TO JULY 17, 1854.**—The Act of May 23, 1844 (5 Stat. 657), commonly called the Town Site Act, was not in force in Oregon prior to July 17, 1854.
3. **EJECTMENT, DEFENDANT MUST PLEAD HIS TITLE.**—The Oregon Code (226) does not allow a defendant in ejectment to defeat the plaintiff, by giving in evidence any estate in himself or another in the property in controversy, unless the same be pleaded in his answer.
4. **COLOR OF TITLE.**—Color of title is only the appearance of title, and therefore it matters not whether the grantor in a deed had any title or not, if it appears from the face of such deed, when compared with the law regulating the subject, that he might have had title, his formal conveyance gives color of title to possession, taken or held under it.
5. **POSSESSION PRESUMED TO BE RIGHTFUL.**—Possession is presumed to be rightful until the contrary appears, and therefore adverse to the title of any other claimant; and this rule extends to the case of a vendee as against his vendor after the performance of the conditions of purchase by the former.
6. **WHEN VALUE OF IMPROVEMENTS MAY BE SET OFF AGAINST MESNE PROFITS.**—A person in possession under color of title, who believes, and has good reason to believe that his title is good, is acting in good faith, so as to entitle him to set off the value of improvements made by him upon the property, against a claim for mesne profits.
7. **POSSESSION PRESUMED TO BE IN GOOD FAITH.**—A person in possession under color of title, who makes permanent improvements upon the property, is presumed to be acting in good faith until the contrary appears.
8. **WHAT IS A PERMANENT IMPROVEMENT.**—A permanent improvement is something done or put upon the land by the occupant which he cannot remove, either because it has become physically impossible to separate it from the land or in contemplation of law, it has been annexed to the soil and become a part of the freehold.
9. **ID.—VALUE SET OFF.**—To entitle a defendant in an action for mesne profits to set off the value of improvements made upon the land against such profits, they must not only be permanent, but they must add to the future value of the property for the ordinary purposes for which it is or may be used.
10. **STREET IMPROVEMENT NOT AN IMPROVEMENT ON THE PROPERTY.**—A street improvement is not an improvement made on the property, upon which the assessment was made for such improvement, and therefore the value of it cannot be set off by the occupant against a claim for mesne profits.

Opinion of the Court—Deady, J.

[January,

11. **STREET ASSESSMENTS MAY BE SET OFF AGAINST MESNE PROFITS.**—It is the duty of a party in possession of property, claiming title or interest therein, to pay the taxes and charges imposed thereon, and therefore an assessment for street improvement paid by a defendant in an action for mesne profits, is a proper deduction from the gross value of the rents of the property, in estimating the actual damage which the plaintiff has sustained, by the defendants withholding of the possession.

Before DEADY, District Judge.

ON December 21, 1868, the plaintiff, Stark, commenced separate actions against six persons, then in possession of different portions of the premises in controversy. On May 3, 1869, the defendants in these several actions answered, disclaiming any interest in the property, and alleging that they were in possession simply as the tenants of the defendant, Starr. On the same day Starr appeared, and was made defendant in place of the tenants. (Or. Code, 226.) Thereupon, in pursuance of the stipulation of the parties, an order was made consolidating the actions and allowing the parties to plead anew, and proceed as if the action had been originally commenced against Starr for the whole premises.

On May 11, the defendant answered the complaint in the consolidated action, whereby he denied each material allegation thereof, except those in relation to the citizenship of the parties and the value of the premises; and also alleged that he had an "equitable title" to the premises, and was entitled to the possession thereof. On June 14, on motion of plaintiff, the last mentioned allegation was stricken from the answer as "immaterial and frivolous," for the reason that an equitable title or interest in land is no defense to an action for possession by the holder of the legal title.

On August 4, and days following, in pursuance of the stipulation of the parties, the cause was tried by the Court without the intervention of a jury.

William Strong and Lansing Stout, for plaintiff.

David Logan and W. W. Chapman, for defendant.

DEADY, J. The complaint alleges that the plaintiff is a citizen of Connecticut, and the defendant a citizen of Oregon, and that the premises in controversy exceed in value

1870.]

Opinion of Court—Deady, J.

the sum of five hundred dollars; that the plaintiff is and for more than six years has been the owner and entitled to the immediate possession of lots one and two and the north half of lot four in block eighty-one in the city of Portland; and that the defendant wrongfully withholds from the plaintiff the possession of said premises and has so withheld such possession for the period of six years, to his damage \$30,000.

On the trial plaintiff gave in evidence a patent from the United States to himself, dated December 8, 1860, to a certain tract of land in the city of Portland, including the premises in controversy. The defendant offered evidence to show that the premises were a part of a tract of land called the town of Portland, which had been laid off in lots and blocks since 1850, and upon which trade and commerce had been carried on more or less ever since. This evidence was offered to show title to the premises in the defendant as an occupant thereof under the Act of Congress of May 23, 1844 (5 Stat. 657), commonly called the "Town Site Act." Being objected to, it was excluded, because the "Town Site Act" was not in force in Oregon prior to its extension here by the act of July 17, 1854. (10 Stat. 305.) And as it appeared from the patent to the plaintiff that he was a "settler" upon the land under the Act of Congress of Sept. 27, 1850 (9 Stat. 497), commonly called the Donation Act, prior to the passage of the act of July 17, 1854, his right under the first act could not be divested by the second one. (*Lounsdale v. Portland et al.*, 1 Deady, 8; *Stark v. Starr*, 6 Wal. 413.)

Again, this evidence was not admissible because no such defense or right was pleaded by the defendant. The Code does not allow a defendant in ejectment, to defeat the plaintiff by giving "in evidence any estate in himself or another in the property, * * unless the same be pleaded in his answer." (Or. Code, 226.)

Except this, the defendant offered no evidence to show title in himself or to impeach or deny that of the plaintiff. The legal title, therefore, being in the plaintiff, he has a present right to the possession and must have judgment accordingly. Indeed, this conclusion was practically admitted on the trial by the counsel for the defendant.

The defendant then offered evidence to show that he had improved the property for the purpose of setting off the present value of such improvements against the claim of the plaintiff for damages for withholding the possession of the same.

The Code provides that in ejectment, the plaintiff may, in the same action, recover damages for withholding the possession for the term of six years prior to the commencement of the action and to the time of giving a verdict therein, exclusive of the use of permanent improvements made by defendant; and also, that:

“When permanent improvements have been made upon the property by the defendant, or those under whom he claims, *holding under color of title adversely to the claim of the plaintiff, in good faith*, the value thereof at the time of trial shall be allowed as a set-off against such damages.” (Or. Code, 226-7.)

Objection was made to the evidence concerning improvements because the supposed set-off was not pleaded in the answer. The objection was sustained, but the defendant had leave to then file an amended answer, in which it is alleged, that he and “those under whom he claims have been and now are holding under color of title adversely to the plaintiff in good faith,” and that while so holding they made permanent improvements upon the premises, of the present value of \$12,312, which sum, or so much thereof as may be necessary, the defendant will set off against the damages to which the plaintiff may be entitled for the use and occupation of the premises. To this amended answer the plaintiff filed a replication, denying specifically each allegation thereof, except the one in relation to the present value of the improvements, and as to this, it alleged that the value of the improvements upon lots one and two was not more than \$3,080, and that there were no permanent improvements of any present value on the north half of lot four.

The evidence offered by the defendant was then heard and received, and the case argued and submitted.

In the consideration of the case the following questions arise:

1. What damages is the plaintiff entitled to for the wrongful withholding of the premises by the defendant?

1870.]

Opinion of the Court—Deady, J.

2. Did the defendant or those under whom he claims make permanent improvements upon the property, while holding under color of title adversely to the claim of the plaintiff, in good faith; and

3. If so, what is the present value of such improvements?

The measure of damages for withholding the possession of the premises is the value of the use and occupation of the same, exclusive of the use of permanent improvements made by defendant.

There is no direct testimony as to whether or not *all* the improvements upon the premises were made by the defendant or those under whom he claims, but such is the reasonable inference. The possession of the defendant and his vendors extends back to 1850, except as to lot one, and that is shown to have commenced not later than 1857. It is also quite probable from the testimony that all the improvements which the defendant seeks to set off against the plaintiff's claim for damages were made by the defendant while sole occupant of the premises, or by him and his brother, A. M. Starr, while occupying them or some portion of them as tenants in common. Indeed, I did not understand that the contrary was asserted or claimed on the trial by counsel for the plaintiff. For the purpose of this inquiry, I think that these improvements, whether made by the defendant as sole occupant or by him and his co-tenant, ought to be considered as made by the defendant.

There is no material conflict or difference in the testimony as to the probable value of the use and occupation of the lots during the six years prior to the commencement of the action and since.

Upon this point, W. S. Ladd, called by the plaintiff, testified that from \$22 to \$25 per month was a reasonable ground rent for each lot of 50 by 100 feet. The defendant, being called as a witness, for himself, testified that such rent was from \$24 to \$30. The mean between these is \$25 $\frac{1}{4}$. Omitting the fraction, this gives for the 2 $\frac{1}{2}$ lots, the sum of \$750 per annum, and \$4,500 for the six years. Add to this the thirteen months which have elapsed since the commencement of the action—December 21, 1868—and we have the sum of \$5,312 $\frac{1}{2}$.

Has the defendant shown himself entitled to a set-off for improvements, as set up in his answer? The first inquiry upon this point is, was the defendant holding under color of title when he made these improvements? Color of title is not title but only the appearance of title. “Any instrument having a grantor and grantee and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described.” (3 Wash. R. P. 139; *Moore v. Brown et al.*, 11 How. 414.) It matters not whether the grantor had any title or not, if from the face of the deed compared with the law regulating the subject, he *might* have had title, his formal conveyance gives color of title to possession taken under it.

Judged by this rule, the possession of the premises has been held under color of title by the defendant and his vendors since the fall of 1850, except lot one, and that has been so held at least since 1857. The facts in regard to the conveyances of the premises appear from the evidence to be as follows:

1. *Lot one.*—July 24, 1852, deed from sheriff of county to Barnhart, and made in pursuance of sale on execution to enforce judgment of *Norton v. Winter and Latimer*; but with this deed the defendant fails to connect himself. September 22, 1857, deed from Eastman to Hutchins and Hale. May 19, 1858, deed from Hutchins and Hale to A. M. and L. M. Starr, the defendant for the north half. May 20, 1858, deed from Hale to Hutchins for the south half. July 15, 1859, deed from Hutchins to A. M. Starr and Ankeny for the south half. July 25, 1860, deed from Ankeny to L. M. Starr for interest in south half. September 18, 1865, deed from A. M. Starr to L. M. Starr for interest in whole lot. From this statement it appears that the defendant and those under whom he claims have had color of title to lot one since September 22, 1857, and that the defendant as the co-tenant of his brother, A. M. Starr, has had color of title to the north half of said lot since May 19, 1858, and to the south half since July 20, 1860, and to the whole lot as sole tenant since September 18, 1865.

2. *Lot two.*—October 3, 1850, deed from Chapman to defendant for the south half. October 9, 1850, deed from

1870.]

Opinion of the Court—Deady, J.

Butler to McCay for the north half. September 16, 1851, deed from Marye to McCay for the north half. September 22, 1851, deed from McCay to A. M. Starr for the north half. January 4, 1864, deed from defendant to A. M. Starr for undivided half of south half. January 4, 1864, deed from A. M. Starr to defendant for undivided half of north half. September 18, 1865, deed from A. M. Starr to defendant for his interest in whole lot. This statement shows that the defendant has had color of title to the south half of lot two since October 3, 1850, and that he and those under whom he claims have had color of title to the north half since October 9, 1850, and that as the co-tenant of A. M. Starr, he had color of title to the whole lot from January 4, 1864, to September 18, 1865, and has had such color as sole tenant since the last mentioned date.

3. *Lot four.*—November 11, 1850, deed from Chapman to Powell. August 12, 1856, deed from Powell to A. M. Starr and defendant. September 18, 1865, deed from A. M. Starr to defendant for the north half.

From this it appears that the defendant and those under whom he claims have had color of title to the north half of lot four since November 11, 1850, and that the defendant, as co-tenant with A. M. Starr, has had color of title to said north half since August 12, 1856, and as sole tenant since September 18, 1865.

As to the possession alleged to be held under this color of title, there is no direct proof except as to that of the defendant and A. M. Starr. As to their vendors it might be inferred that they had the actual occupation of the premises described in their several deeds, and certainly nothing appears to the contrary. But as the supposed improvements have been made since the premises are alleged to have been in the possession of the defendant and A. M. Starr, the inquiry as to the possession or good faith of their vendors or predecessors is not material.

The evidence satisfies my mind that the defendant has been in the possession of the premises, except the north half of lot two, either as tenant in common with A. M. Starr or as sole tenant, since July 25, 1860, and as tenant in common of north half of lot two with A. M. Starr since January,

Opinion of the Court—Dedy, J.

[February,

1864, and that the latter had been in possession of the same prior to that time as far back as 1851.

The possession of the Starrs was taken in pursuance of their deeds. They did not enter under the plaintiff or hold under him. It was open and visible and actually with the knowledge of the plaintiff. They were aware of his patent, and also of his claim to be a settler upon a tract of land including the premises, under the Donation Act, but their deeds and possession were prior in point of time to the patent. After the issue of the patent, and probably before, they knew that the plaintiff had the legal title to a tract of land including the premises, but believed that he was bound to convey such title to them and would be estopped to assert it against them; and the evidence tends to show that about the date of the patent the plaintiff declared to them that he would convey them such legal title for a mere nominal consideration, but whether as a matter of favor or legal obligation does not appear. It also appears that since 1862 the Starrs expended \$5,000 or \$6,000 in improvements upon the property, and were in the regular receipt of the rents and profits of the same; and that about 1864 they brought a suit against the plaintiff concerning their title, in which they failed to obtain any relief. That in 1864 the plaintiff said to the defendant, that Chapman never paid him for the property, but that if he, Chapman, would pay him, he, the plaintiff, would make the defendant a deed.

For some reason, neither party has seen proper to show how property, apparently within the donation claim of the plaintiff, should have been sold and conveyed as far back as 1850, by persons having no apparent relations with the plaintiff or connection with the legal title.

The circumstances referred to in the remarks of the plaintiff to the defendant in 1864, indicate that at some time Chapman and himself had come to an understanding or agreement, by which the plaintiff was to make a deed to this property in favor of the defendant or those under whom he claimed, and that the plaintiff excused his failure to perform on the ground that Chapman had not paid him for the property. It also indicates that lots one and the north half

1870.]

Opinion of the Court—Deady, J.

of two were originally sold by Chapman, as well as lots four and the south half of two.

These are all the material circumstances proven in the case, which bear upon the character of the defendant's possession, and they are all drawn from the testimony of the defendant himself, and A. M. Starr. Was this a "holding under color of title adversely to the claim of the plaintiff," or in other words, was the possession of the Starrs adverse to the title or right of the plaintiff?

What constitutes adverse possession has been one of the vexed questions of the law. In some cases the practical effect of the ruling of the Courts has been to require actual proof that the possession of the occupant was adverse, even when nothing appeared to the contrary, or to presume that his possession was in subservience to the legal owner because the contrary did not affirmatively appear.

But the just and reasonable rule seems to be, that every possession is presumed to be rightful and therefore adverse to the title of any other claimant. This presumption may be overcome by the proof of facts inconsistent with it, as by showing that the occupant received a lease; paid rent; or acknowledged the superiority of the title set up.

In *Parker v. Proprietors, etc.* (3 Met. 99), the Court say: "If a person enters on land, having no right or title, and maintains the exclusive possession, taking the rents and profits, his possession would be considered adverse, and, if of sufficient notoriety, would amount to a disseizin." Here the unexplained fact of possession and receipt of rents and profits is held to constitute an adverse possession; and for the simple reason it must be that the law presumes every possession rightful until the contrary appears or is shown.

In *La Frombois v. Jackson* (8 Cow. 618), Senator Viele says: "Every possession, then, is adverse, and entitled to the peaceful and benignant operation and protecting safeguard of the statute, which is not in subservience to the title of another, either by a direct acknowledgment of some kind, or an open or tacit disavowal of right on the part of the occupant; and it is in the latter case only, that the law adjudges the possession of one to the benefit of another."

In *Smith v. Lorillard* (10 John, 356), Kent, Ch. J., says:

“ Possession is always presumption of right, and it stands good until other and stronger evidence destroys that presumption.”

Tried by this rule the possession of the defendant and A. M. Starr, must be considered adverse to the title of the plaintiff. They were in the actual and exclusive possession and receipt of the rents and profits. They did not enter under the plaintiff, but so far as appears without any recognition of his title.

But it is also true, that in the course of their possession, the Starrs acknowledged the legal title to be in the plaintiff—the final confirmation of his right as a settler under the Donation Act, by the issue of a patent to him by the United States. But this acknowledgment was always coupled with the opinion and assertion upon their part, that the plaintiff had no beneficial interest in the property, and, in some way, was bound in equity, and good conscience to convey such title to them.

Upon this aspect of the case, the learned counsel for the plaintiff insist, that since 1860, and prior to the making of any of the supposed improvements, the possession of the Starrs must be considered as being held in subservience to the title of the plaintiff, because during this time they acknowledged it and claimed to be entitled to it, and therefore their possession could not be adverse to it. In support of this argument, counsel cited the well-known rule that the possession of the vendee under the contract of purchase is not deemed adverse to the title of the vendor.

But admitting for the sake of the argument, the proper conclusion from the facts in the case to be, that the relation of vendor and vendee existed between the plaintiff and the Starrs—that the latter entered under a mere purchase of the possession, acknowledging the title of the former as paramount, but claiming for any reason to be entitled to have such title conveyed to themselves, it would not follow that their possession was not adverse.

After performance by the vendee of the conditions of sale, as the payment of the purchase money, and when in equity he would be entitled to have a conveyance of the title, his possession may become adverse to the title of the vendor,

1870.]

Opinion of the Court—Deady, J.

and in the absence of any proof to the contrary, should be presumed to be so. (*La Frambois v. Jackson, supra.*)

In *Briggs v. Prosser* (14 Wend. 228), Nelson J., it is stated, "There can be no doubt that a person entering upon land under a contract of purchase, unperformed on his part does not hold possession adversely to the vendor. *After performance*, and an equitable title to a deed of the premises acquired, I perceive no reason why his possession may not become adverse, or, in other words, there is nothing in the character of it inconsistent with the idea of an adverse possession. Whether it were in fact adverse or not, would depend upon the circumstances of each particular case."

This leads to the consideration of the point as to whether the Starrs were acting in good faith or not. To entitle the occupant to set off the value of his supposed improvements against the plaintiff's claim for mesne profits (damages), they must have been made while the occupant was "holding under color of title, adversely to the claim of the plaintiff," and "*in good faith.*" To enable the defendant to claim the benefit of the law giving the set-off, these three things must concur. He must have held possession under color of title; his possession must have been adverse to the title of the plaintiff; and he must have acted in good faith.

Good faith, in relation to the colorable title, must mean nothing more nor less than that the party honestly believed his title good, although, upon investigation, it proves otherwise. Of course, in determining whether a party did so believe or not, weight must be given to the particular circumstances of the case. For, although the occupant hold under color of title, yet, if at the same time he knows, or has *good reason to believe* that his title is merely colorable, and confers no right as against the legal owner, he is not acting in good faith. If, under such circumstances he makes improvements, he does so at his peril, and cannot compel the true owner to allow him for them. If, then, the occupant honestly believes his title valid, however defective or unreal it may prove to be, he is holding in good faith. The good faith required by the code, is an actual belief in the apparent title under which the occupant holds and improves.

Upon whom is the burden of proof in this matter? Good faith is the opposite to bad faith, and bad faith and fraud are synonymous. Fraud is never presumed, except when the law peremptorily so declares, but must be proven. It would seem, therefore, that the occupant in this particular as in general is presumed to have acted in good faith until the contrary appears.

No evidence has been produced by the plaintiff to show that the Starrs were acting in bad faith. Nothing in the circumstances of the case tends to support that conclusion. On the contrary, the very fact that they expended several thousand dollars in making improvements on the land is evidence of their good faith—a faith which manifested itself by its works. My conclusion upon this branch of the case is, that the Starrs were “holding under color of title adversely to the claim of plaintiff, in good faith.”

Next, while so holding did they or either of them make permanent improvements upon the premises? At common law when the owner of an estate, who had been disseized, sought to recover damages for the loss of the profits during the ouster against the wrongful occupant thereof, the latter might *recoup* such damages to the extent of the value of permanently *useful* improvements put upon the land by himself. And this was so, whether the remedy pursued was assize of novel disseisin, trespass with *continuando* brought after entry or after recovery in ejectment. (*Gill v. Patten*, 1 Cr. C. C. 465; *Green v. Biddle*, 8 Wheat. 81-2.) In *Jackson v. Loomis* (4 Cow. 172), it was held in an action of trespass for mesne profits, that a *bona fide* occupant should be allowed the value of his improvements made in good faith to the extent of the rents and profits claimed. (See, also, 1 Story, 494.)

The provision in the Code concerning permanent improvements is a substantial affirmance of this common law rule, restricted in all cases to the case of a *bona fide* possessor holding under color of title. Interpreting the phrase “permanent improvements” by the common law, it must be construed to mean something done to or put upon the land which the occupant cannot remove or carry away with him, either because it has become physically impossible to separate it from the land, or because in contemplation of law it

1870.]

Opinion of the Court— Deady, J.

has been annexed to the soil and is therefore to be considered a part of the freehold. Such an improvement, if it exist at the time of trial, is a permanent one. The term is a relative one and does not import any particular length of time. The degree of permanency or probable duration of the improvement is only material in estimating its value. Whatever the occupant may remove when ejected from the premises, is not a permanent improvement, and, therefore, there is no reason that he should be allowed for it out of the claim for rents and profits.

But the thing done to or upon the land must also as the word imports be an *improvement* to it—it must meliorate—better the condition of the property. It must make it more valuable in the future for the ordinary purposes for which such property is owned and used. Therefore a structure or labor may be as permanent in every sense of the word as the pyramid of Cheops, and yet add nothing to the usefulness or value of the land for ordinary purposes. It does not make the land more beneficial to the true owner, and is not an improvement. (*Bright v. Boyd*, 1 Story, 494.)

With this understanding of the phrase “permanent improvements,” let us see what is the character and value of the alleged improvements in this case.

Burton and Goodenough, two master mechanics, called by the plaintiff, testified that they had examined the property during the trial. Their testimony substantially agrees, and is to the effect—that there are on lots one and two, three new wooden buildings, and an old shop connected with a marble yard, and on the north half of lot four there is an old wooden house, and that the present value of the new buildings is \$350 each, of the shop \$100, and the old wooden house \$400. That there is a stone wall built across lots one and two on the east end, fronting on the Wallamet river, which would now cost \$3,025, and that in their judgment the buildings are not permanent improvements, but the wall is. The defendant testified that either he or he and A. M. Starr caused the wall and buildings to be put upon the premises—the former in 1863 and the latter since. He also testified that the three new buildings were worth \$1,200, and that the buildings on north half of lot four were

worth \$1,800 or \$2,000. On cross-examination stated he could not say that the three buildings were worth \$1,200 *now*. The defendant also testified that the stone wall was built as a part foundation of a house and to protect the bank from the river, but that he had abandoned the building of the house on account of the litigation concerning the premises with the plaintiff in 1864-5; and that in 1865 he had paid the municipal authorities of Portland the sum of \$1,200 or \$1,500, which was assessed upon said premises, for the purpose of paving and improving the street in front of them. It appears from the testimony of W. S. Ladd that these buildings, situated as they are, will rent for an average of \$20 each per month exclusive of ground rent or the value of the land.

This is the substance of the testimony concerning the nature and value of the supposed improvements. The burden of proof is upon the defendants to show that they are beneficial to the property and to what extent.

This testimony shows beyond a doubt that the buildings—all five of them—are “permanent improvements” within the legal sense of that phrase. The *opinion* of the witnesses as to their *permanency* cannot control the judgment of the Court upon the facts. As Mr. Burton said himself on cross-examination, “they are permanent as long as they stay there.” They are permanent because they are fixtures—things annexed to the soil—and the defendant, being a wrongful occupant of the premises, has no right to take them away if he would. Upon this point the plaintiff’s witnesses evidently testified under a misapprehension of the meaning of the term “permanent.” If they were not permanent in some degree, they would have no value, and yet both these witnesses give them a present value of between \$1,400 and \$1,600. They also improve the property. They will rent for a certain sum per month and they enhance the present value of the property by that amount. Town lots are ordinarily used for building houses upon, to be rented. These buildings are improvements of that character. Their actual value depends upon how long they will probably endure and be fit for use.

Upon this point the evidence is not uniform. The testi-

1870.]

Opinion of the Court—Deady, J.

mony of the defendant puts the value of the buildings at not less than \$3,000; that of Burton at \$1,400; that of Good-enough at \$1,550, while Mr. Ladd gives them a present rental value of \$1,200 per annum. While it is apparent that these buildings enhance the present value of the property, it is difficult in the nature of things, and particularly upon this evidence, to say precisely by how much.

This depends upon the probable durability of the buildings, the cost of keeping them up and the probable future demand for such houses—in other words, what is likely to be the annual net gain to the owner of the property from their future rental and for how long. The future rental of cheap, small wooden buildings is not capable of a very definite estimate. Under these circumstances and state of the proof, I have found the present value of the buildings to be \$2,000.

The foundation wall is a *permanent* structure beyond a question, but I cannot satisfy my mind from the testimony, that it is of any benefit to the owner of property, or enhances its *present* value in any degree. If a house were built upon it, the result might be beneficial to the property, but to require the owner to build the house to make the wall available, would be in effect controlling him in the future use and enjoyment of his property for the benefit of the occupant. Practically the house would be the improvement and not the wall alone. But it may be said that the wall alone is a present benefit to the property as a means of protecting the bank from the wash of the river—and I do not overlook the fact that the defendant testified that it was partly built for that purpose. Yet, judging from the *indefinite and hesitating* manner in which the defendant made that statement, and his definite and positive testimony that the wall was intended as the foundation for a house, which was not built on account of his litigation with the plaintiff, and the further fact, that the defendant has failed to produce any evidence to show that a wall is in any degree or manner necessary to protect the bank from the action of the river, I conclude that it is not. The burden of proof is upon the defendant to show the value or benefit of this wall to the property, and if it was in fact useful as a protection against

the water, it was very easy to have shown it by the testimony of persons conversant with the subject.

The amount paid the City of Portland by the occupant as an assessment for the improvement of the street adjoining the premises, is objected to as a set-off by the plaintiff as not being an improvement “made *upon* the property.”

This may be called a technical distinction, but nevertheless, it is a substantial one. The assessment upon the property for the purpose of improving the street was a tax upon it—nothing more nor less. The payment of taxes upon property is not an improvement made *upon* it, however much such payment may indirectly enhance its value. This item of the alleged set-off is not within either the letter or reason of the provision of the Code concerning “permanent improvements.”

But it is a proper deduction to be made from the gross rents of the property in estimating the actual damage which the plaintiff has sustained by the defendant's wrongful withholding of the possession. The expenditure was not made voluntarily by the defendant, but in obedience to the law and for the benefit of the property, and consequently its owner. It is the duty of a party in possession of property, claiming title or interest therein, to pay all lawful taxes and charges imposed thereon by public authority. If he neglect to do this, and purchase the property at a sale for these taxes, he acquires no right thereby, because his conduct is deemed fraudulent as against the true owner. As it turns out, these taxes were paid by the defendant for the benefit of the plaintiff. If the former had not paid them the latter must, or allowed the property to have been sold as delinquent. Therefore in estimating the damages to which the plaintiff is entitled for being kept out of possession, the amount of the assessment must be deducted from the gross rents, and the remainder is the true profits or damages, (1 Story 478).

On the contrary, if the payment of a tax by an occupant without title could only be allowed him against a claim for mesne profits, by way of set-off, as for a permanent improvement, it would often happen that it could not be allowed at all. For instance, if the pavement put upon the street by

1870.]

Opinion of the Court—Hoffman, J.

this assessment were now worn out or if from serious defects in plan, materials or workmanship, it had proved worthless, it would not be of any *present* value to the property and could not be the subject of a set-off. But as the tax was paid and expended in obedience to public authority, the occupant is not responsible for such consequences or results, and therefore his right to be re-imbursed ought not to depend upon them.

In conclusion the plaintiff is entitled to a judgment for the recovery of the possession of the premises.

As has been shown, the use and occupation of the premises, exclusive of defendant's improvements, was worth \$5,312.50. Deduct from this the amount—\$1,350—of the tax paid for street improvements, and the remainder—\$3,962.50—is the mesne profits, or damages, to which the plaintiff is entitled. Against this amount set off the present value—\$2,000—of the permanent improvements, and the remainder—\$1,962.50—is the sum which the plaintiff is entitled to recover off the defendant, together with costs and expenses.

THOMAS SCULLY v. THE STEAMER GREAT REPUBLIC.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

FEBRUARY 8, 1870.

- 1 DISSOLUTION OF CONTRACT WITH SEAMEN—MASTERS' OBLIGATIONS.—Where a seaman fails by his own fault to rejoin the ship at an intermediate port, at which she has touched in the course of the voyage, and she sails away without him, the master is not bound to reinstate him upon the return of the vessel to the same port in the course of her voyage.

Before HOFFMAN, District Judge.

Sullivan & Ellsworth, Proctors for libellant.

Cutler McAllister, Proctor for claimant.

HOFFMAN, J. The above vessel is one of the line of mail steamers plying between this port and Hongkong, in China,

Opinion of the Court—Hoffman, J.

[February,

touching at the port of Yokohama, both on the outward and return voyages.

The libellant shipped at this port for the round voyage, as assistant in the steward's department. The vessel arrived at Yokohama on the twenty-seventh April, 1869, and on the twenty-ninth the libellant went on shore by permission, as he says, of the steward. By some accident not clearly explained, but probably owing to an indulgence in liquor, he did not return to the landing until after the vessel had sailed.

He therefore remained at Yokohama until the vessel, having made her voyage to Hongkong, touched at Yokohama on her return. The libellant thereupon went on board and claimed to be received again into the service. This the master declined, and took him, with another person similarly situated, before the consul. The latter, on hearing the circumstances, decided that the men were deserters and forfeited their wages and all right to be reinstated in their positions, and an entry to that effect was made on the articles.

The libellant still continued his importunities to be received on board, and the master consented to allow him to resume his position, but on condition that he would relinquish all claim upon the ship for his past or future services until the end of the voyage. The libellant declined to accede to these conditions, and went on shore, where he remained about a month, when he succeeded in obtaining leave to work his passage to this port on board the Japan.

He now claims his wages up to the time he first left the vessel, his expenses at Yokohama from the time he offered his services to the master, and his wages from that time until his arrival at this port.

In arriving at a determination as to the rights of the seaman and the duties of the master under these circumstances, I have not thought it material to decide whether the libellant left the ship in the first instance with or without permission. Assuming that he had leave to go ashore, that leave was necessarily restricted to a short absence, and subject to the paramount duty of returning before the vessel sailed.

The nature of the service in which the vessel was engaged required punctuality and despatch. Her days of departure

1870.]

Opinion of the Court—Hoffman, J.

and arrival were announced in a schedule published in advance, and it was the duty of every seaman, or even passenger, who might desire to go ashore, to ascertain the hour at which she would sail, and to be punctual in returning to the ship. As the libellant neglected this duty, his fault is as great as if he had originally gone ashore without permission. But his absence, though culpable, did not amount to a desertion. There is no reason to believe that he left the ship *amino derelinquendi*, or with the intention of finally quitting the service. His clothes were left on board, and he endeavored, though too late, to rejoin her.

Neither does it appear that any entry on the log book was made, such as is necessary to fix upon him the consequences of a statutory desertion. As therefore the seaman did not commit the offense, or incur the penalties of a desertion, the only question to be considered is whether he had a right, under the circumstances, to require the master to reinstate him on the return of the vessel to Yokohama.

The duty of the master to receive on board, and to condone the offense of a repentant seaman, is enjoined by the earlier maritime codes, and enforced by numerous judgments of modern Admiralty tribunals.

He is entitled to be received on board even after an intentional desertion if he tenders amends at a proper time and manner, and before another person has been employed in his stead; unless his prior conduct has been so flagrantly wrong as to justify his discharge. As observed by Judge Peters, "public policy and private justice, as it is fit they should, here move together." (*Whitton v. The Commerce*, 1 Pet. Adm. Dec. 161; *Lois d'Oleron*, Art. 14; *Laws of Wisbug*, Art. 25; *Cloutman v. Tenison*, 1 Sum. 373; *Curtis' R. & Dut. Merc. Seam.*, p. 132.)

It does not appear in this case that any one had been employed in the place of the libellant.

It may, however, be presumed that if the service for which he was engaged was necessary to the ship, the master, who could have had no certain assurance of finding him at Yokohama on his return, would naturally have provided for its performance by the employment of a substitute.

Opinion of the Court--Hoffman, J.

[February,

It is not contended that he had been guilty of any previous offense, such as would have justified his discharge. The question then is, was his offer to return to duty and his tender of amends made under such circumstances as imposed on the master the obligation of receiving him back? Hongkong is distant from Yokohama some sixteen hundred miles. The vessel had performed this voyage and returned to Yokohama—in all thirty-two hundred miles—while the libellant, by his own fault, was not on board. The usual duration of the round voyage for which he shipped is two and a half months. The time that elapsed from her departure from Yokohama until her return was thirty days. The libellant had thus been out of the service for considerably more than one third of the whole period for which he shipped.

And this failure to perform so important a part of the duties for which he contracted was caused by his own fault. When he committed that fault he knew that its inevitable consequence was to deprive him of the ability to perform his contract during nearly one half of the term of his service.

If he had been a mate, or an engineer, or even a cook or a fireman, the loss of his services might have occasioned great inconvenience, or even peril to the ship. In such case, if the master had, as would have been indispensably necessary, employed another person in his stead, he would have been without the pretense of right to be received on board. The circumstance that it is not proved that another was so employed, ought not, in my judgment, to impair the master's right to treat the contract as broken, and himself as discharged from its obligations.

If the master was bound to receive the libellant back after an interval of thirty days, and when a voyage of 3,200 miles had, in the meantime, been performed, when should this obligation be deemed at an end—at the expiration of six months, or as might occur in the case of a whaling vessel, at the end of a year?

Pothier in his treatise, *de Lou Mar.*, p. 174 (cited in Curtis on Merch. Seam., p. 135 in note), considers that when the mariner, by an accident or *vis major*, such as sickness, is prevented from fulfilling his obligations, and from

1870.]

Opinion of the Court—Hoffman, J.

going in the ship for which he has been hired, although he incurs no penalties, yet the master may claim to be discharged from the hiring of services which the mariner has not been able to render, and to demand the restitution of his advances.

But where the seaman has been prevented from embarking by his own fault, as by an arrest for a crime which he has committed, then the breach of his obligation being the consequence of his own act and fault, he would be liable to damages—as, for example, if the master had given higher wages to one hired in his place—notwithstanding the fact that his absence not being voluntary, would not subject him to the penalties of desertion.

Although Pothier does not in this passage directly treat of the right of the seaman, who, by his own fault, fails to rejoin the ship, to be reinstated on subsequent repentance and offer of amends, yet it may be clearly be inferred that, in his opinion, the effect of a failure on the part of the mariner to render himself on board the ship, in consequence of which she departs without him, is to discharge the master from the obligations of the contract, and this whether the failure be caused by *vis major*, or by the seaman's fault. He certainly does not intimate that in the latter case, the seaman has a right to demand to be received on board at any subsequent period of the voyage and wherever he may find the ship.

On grounds of policy, also, this privilege should not be accorded.

The degree to which, in cases of this kind, the conduct of the seaman is the result of volition or design, it is not easy always to determine. In some instances, his failure to rejoin his ship may be caused by mere accident.

In others, it may arise from a reckless indifference to, or contempt of, his duty, nearly allied to a willful intention to violate it—as when by indulgence in drink, he has incapacitated himself from reaching the place of embarkation.

Even where he has determined to be left behind he can readily, by arriving just in time to be too late, give to his fault the appearance of accident or unpremeditated neglect. If in such cases his right to be reinstated at any subse-

quent period be recognized whenever the master is unable to show a voluntary desertion, or that he has employed another person in his place, an encouragement would be held out to the mariner to avoid the performance of his duty for perhaps the most important or the most arduous part of the voyage, with the assurance that when the vessel touches again at the port he must be received on board with rights unimpaired, except as to the wages which he would have earned during his absence, and as to such other charge as may indemnify the ship for the damage his absence has caused.

A fault of this kind on the part of a mate or engineer would justly be regarded as a grave offense.

I think the seaman's conduct should be viewed in the same light, and he should be apprised that when he commits it and the vessel leaves port without him, his contract is broken—his rights under it lost and his connection with the vessel severed, except at the master's discretion.

I have treated this case more at length than its difficulty demanded, because it was intimated at the hearing that the masters and owners of the steamers of this line desired to be informed what their rights and duties are in cases like the present, which are said to be not infrequent.

Under the proofs in this case the libellant has not incurred the penalties of desertion. He is therefore entitled to receive the wages earned by him up to the time he left the vessel, no evidence having been offered to show any special damage to the ship caused by the loss of his services.

1870.]

Opinion of the Court—Deady, J.

JOHN CATLIN, *Assignee of Randall and Sunderland*, v. JOHN R. FOSTER.

CIRCUIT COURT, DISTRICT OF OREGON.

FEBRUARY 14, 1870.

1. **BANKRUPT, EMPLOYMENT OF BY BAILEE.**—Where a bailee of an insolvent debtor's goods, prior to the filing of a petition in bankruptcy against such debtor, employed him to assist in the sale and management of such goods: *Held*, that such employment was not illegal and that the bailee, as against the assignee in bankruptcy, was entitled to a credit for the amount paid therefor.
2. **BAILEE ENTITLED TO CREDIT FOR SERVICES.**—Where a bailee of an insolvent debtor's goods bestowed labor upon and about them, with a knowledge that such debtor had committed an act of bankruptcy in making such bailment, he is entitled to a credit for the value of such services as against the claim of the assignee in bankruptcy for such goods or their value.
3. **MUTUAL DEBTS OR CREDITS.**—What is a case of mutual debts or credits within the meaning of Section 26 of the Bankrupt Act?
4. **ORDER EXPUNGING CLAIM WILL NOT PREVENT ITS BEING PLEADED AS SET-OFF.**—An order expunging a claim against the estate of a bankrupt, is not such an adjudication thereof as prevents the creditor from pleading it as a set-off in an action by the assignee for a claim due such estate.
5. **CONDITIONS PRECEDENT TO ACTION BY CREDITOR.**—*Semble*, that the proof of a debt before the register and the rejection thereof by the District Court, and the appeal therefrom to the Circuit Court, are conditions precedent to the creditor's right to maintain an action against the assignee for the recovery of his debt, but do not constitute or have the effect of an adjudication upon or against such claim.

Before DEADY, District Judge.

David Friedenrich, for Plaintiff.

David Logan, for Defendant.

DEADY, J. This action was commenced July 26, 1869. The complaint states that on January 30, 1869, proceedings were commenced in the District Court for this district, wherein said Randall & Sunderland were duly adjudged bankrupts, and that plaintiff is the assignee of their estate; and that the defendant from January 9th to the 30th aforesaid, had the possession of all the goods and chattels of said bankrupts, and that during said period said defendant sold and disposed of parcels of said goods and received

Opinion of the Court—Dedy, J.[February,

sums of money due said bankrupts, in all to the amount of \$1,525.74 in gold coin, and paid out of said moneys on account of said bankrupts the sum of \$926.99, retaining in his possession \$597.74 of said moneys; and that afterward, on July 7, 1869, the plaintiff, as assignee aforesaid, demanded the same of the defendant, and that defendant refused to deliver said moneys or any part thereof to the plaintiff and still detains the same: Wherefore the plaintiff prays judgment for the delivery of said money with interest in coin for the use thereof at the rate of ten per centum per annum since April 9, 1869.

The answer of the defendant admits the allegations in the complaint, except that it denies that the defendant received any greater sum than \$1,514.73, and avers that he paid out \$979.49, and denies that he retained or still retains any greater sum than \$535.24, received by him for goods sold or debts collected, belonging to said bankrupts.

The answer also contains two counter-claims which the defendant offers to set off against the demand of the plaintiff. The first for the sum of \$250, which the defendant's attorneys demand of him for legal services rendered the defendant while conducting and settling the business of Randall & Sunderland. The second is also for the sum of \$250 for and on account of the services of defendant in and about the management of the business of said Randall & Sunderland.

On motion, the first of these counter-claims was stricken out, as it did not appear that the defendant had ever paid the amount to the attorneys, but only that they *claimed* that he was liable for it.

To the second claim the plaintiff replied—denying knowledge of defendant's services and that they were worth \$250.

Also, that on January 9, 1868, Randall and Sunderland made an assignment to the defendant of all their goods and effects, under which assignment the defendant took possession of all the property of said bankrupts; that said assignment was made in fraud of the bankrupt act and was the act of bankruptcy upon which said Randall & Sunderland were adjudged bankrupts; and that defendant colluded and conspired with said bankrupts in said fraudulent act, and in

1870.]

Opinion of the Court—Deady, J.

fraud of the bankrupt act managed the business of the bankrupts until enjoined therefrom by the proceedings in bankruptcy on January 30, 1869.

Also, that on April 1, 1869, the defendant filed a claim against the estate of the bankrupts for the same services; that afterwards certain creditors of said estate filed objections to said claim and such proceedings were had thereupon, before the Register on default of the defendant, that an order of this Court was made expunging said claim from the lists of claims upon the assignees' record, which order still remains in full force.

In pursuance of the stipulation of the parties, the cause was tried without the intervention of a jury on January 25th, and reserved for decision.

On the trial the defendant was called as a witness by the plaintiff. The only other evidence introduced was the assignment and the papers and proceedings in the bankruptcy case.

The evidence of the defendant supported his answer as to the amount of money received and paid out by him on account of the bankrupts, during his possession of the goods, and as nothing was shown or appears to the contrary, the fact must be found accordingly.

Of the money so paid out, as it appears from the account stated by the defendant, which is a part of his testimony, there was paid to Sunderland, one of the bankrupts, on January 30, the sums of \$31.50 and \$21. On account of these payments being made to the bankrupt, the plaintiff objects to their being treated and considered as payments on account of the estate.

According to the testimony of the defendant the payments were made under these circumstances. The business of the bankrupts consisted of a retail boot and shoe shop, and some manufacturing up-stairs, with a stock of about \$14,000. The defendant had the general superintendence of the business and employed Sunderland to oversee the manufacturing at \$75 per month. Paid him sums on tag from time to time, amounting in all to the sum of the two payments, which were afterwards charged on January 30, and that such wages were less than a person not interested could be obtained for.

Opinion of the Court—Deady, J.

[February,

The *fact* of the payments, is in effect, denied in the pleadings, but on the trial, the objection insisted upon was the illegality of paying money to one of the bankrupts. But I do not perceive that the employment of Sunderland on fair terms to do what was necessary and convenient to be done about the business, is in any way contrary to law or good morals. Indeed, I suppose the defendant might have returned to R. & S., at any time prior to the injunction, all the property he received from them under the void assignment. Much more, it seems to me, might he pay S. reasonable wages for work and labor performed about the business and property while under his charge. In any view of the matter, the defendant is only liable to the plaintiff for what came into his hands from or through the bankrupts, and was not returned to them or their representative—the assignee in bankruptcy. The question is, was the payment or delivery of the \$52.50 actually made to S. prior to the service of the injunction upon the defendant on January 30th, or not. If made after the service of the injunction—being in such case made in violation of it—I suppose it would be wrongful and the defendant would still be liable for the amount.

But, as has been suggested, the fact of the payments having been made as alleged, was not seriously contested on the trial. The testimony of the defendant is direct and positive to that effect, and it must be considered proven. This shows that the defendant has only \$532.24 in his hands belonging to the estate of R. & S.

Is he entitled to set off his claim for services against a like amount of this sum?

The plaintiff's objection to the allowance of this set-off has been stated in his replication. From the evidence it appears that the defendant went into possession and control of the goods and business of R. & S. on January 10, 1869, under an assignment to himself, which was afterward, namely, on February 27th, adjudged void by this Court, as being a fraud upon the Bankrupt Act, and an act of bankruptcy, and that he continued in such possession and control, and managed and conducted said property and business under said assignment, until enjoined by this Court, on January 30, thereafter.

1870.]

Opinion of the Court—Deady, J.

As to the alleged conspiracy and collusion between the defendant and R. and S., there is no direct proof. But from the circumstances shown the inference is reasonable that the defendant accepted the assignment and went into possession under it with a knowledge of the facts which, in contemplation of law, made such assignment fraudulent and an act of bankruptcy—namely, that R. and S. were insolvent and were by that means attempting to dispose of their property with intent to defeat and delay the operation of the Bankrupt Act.

On account of this knowledge the plaintiff claims that the defendant is not entitled to anything for his services under this illegal assignment; and that if he is, he should be required to prove his debt and take his *pro rata* with the other creditors, and not receive his pay in full by being allowed it as a set-off against the money of the estate in his hands.

The questions made by the objection of the plaintiff are not free from doubt.

By section 20 of the Bankrupt Act it is provided: “That in *all* cases of *mutual debts* or *mutual credits* between the parties, the account between them shall be stated and one debt set off against the other and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate; *Provided*, That no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition.”

This is the only provision in the Bankrupt Act touching the subject of set-off, and it is substantially the same as that contained in 6 G. 4 C. 16, section 50; but the English act further provides that such set-off may be made “notwithstanding any prior act of bankruptcy committed by the bankrupt before the credit given or debt contracted by him. * * * ; *Provided*, That the person claiming the benefit of such set-off, had not, when such credit was given, *notice of an act of bankruptcy by such bankrupt committed.*”

But for this proviso, it seems to have been holden in the English Courts, that a debtor to a bankrupt could only be called upon to pay the balance after deducting what the bankrupt owed him, whether the credit was given to such

bankrupt after notice of an act of bankruptcy committed by him or not. (1 Bac. Ab. 647.)

This proviso not being in our act, nor any equivalent of it in legal effect, I conclude upon this authority, and indeed upon general principles, that although the defendant had notice of the act of bankruptcy committed by R. and S. when he rendered the service,* he is entitled to set off the value of the same against what he owes them or their assignee, *provided*, the transaction amounts to a case of mutual credit between the parties, and the defendant's "claim in its nature is provable against the estate."

The term *mutual credits* in the Bankrupt Acts is more comprehensive than the term mutual debts in the statutes of set-off. The term *credit* is synonymous with *trust* and the trust or credit need not be of money on both sides, but if one party entrusts the other with *goods or value* it will be a case of mutual credit. (7 Bac. Ab. 170.)

By section 42 of the Bankrupt Act of April 4, 1800, when a mutual credit was given before a party became bankrupt a set-off was allowed between the parties. Under this act it was decided that where the acceptor of a bill of exchange paid it after bankruptcy of the drawer, he might set off the amount of the same in an action by the assignee of the drawer for the value of certain goods consigned to the acceptor after the acceptance, and by him converted into money before the bankruptcy. This was held to be a case of mutual credit *before* the bankruptcy, although the defendant did not pay the debt set off until after the bankruptcy; and although under that act the debts, for that reason, could not have been proved against the estate. (*Marks v. Barker*, Wash. C. C. 178.)

In the case of *Rose v. Hart* (8 Taun. 499; cited 7 Bac. Ab. 650), it was ruled that where cloth was deposited with a fuller to dress by a party who afterwards became bankrupt, that there was a case of mutual credit to the value of the services for dressing the cloth, but not for a general balance due from the bankrupt; and in that case the general rule was laid down that the *credits* intended by the act were only such "as must in their very nature terminate in cross debts; as where a debt is due from one party and credit given by

1870.]

Opinion of the Court—Deady, J.

him on the other, for a sum of money payable at a future day and which will then become a debt; or when there is a debt on one side and a delivery of property with directions to turn it into money on the other; but where there is a mere deposit of property, without authority to turn it into money, no debt can ever arise out of it, and therefore it is not a credit within the meaning of the statute."

Within the rule laid down by these authorities there can be no doubt but that this was a case of mutual credit—at least to the value of the defendant's services. The defendant received the goods and accounts and undertook in the course of the business to convert them into money. His skill and labor in this respect have some value. R. & S. credited—*trusted*—him with the property and with the money he might realize from it, and the defendant credited them for his services—yet to be rendered. Therefore the credits were mutual—and were also such credits as must result in cross debts.

The debt of the defendant is also provable under the act. Section 9 provides: "That all debts due and payable from the bankrupt, at *the time of the adjudication in bankruptcy*, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest was payable by the terms of the contract, may be proved against the estate of the bankrupt."

In the case under consideration the adjudication was made on February 27th, and on January 30th, the debt due the defendant for his services was both due and payable; and if it had then only existed, but been payable at a future day, would still have been provable.

What is the value of the services? In his answer the defendant claims that they are worth \$250 in coin. On April 1, 1869, he swore to the proof of debt before the Register for these same services, in which he stated that R. & S. were justly indebted to him on that account "in the sum of \$125,* * * for labor and services * * from January 9th, 1869 to January 30th, at the rate of \$200 per month in legal tender." At that time \$125 in currency was about equal to \$100 in coin. On the trial the defendant being asked by his counsel if \$250 in coin was a reasonable compensation for

his services, did not answer yea or nay, but said—“ *I don't think it very extravagant.*”

The service was a general superintendence of a retail boot and shoe shop for twenty days, with the assistance of Sunderland, one of the former proprietors and assignors.

I think \$5 per day in coin a fair compensation. That is what the defendant estimated the value of his services at, in his proof of debt before the Register last April, and no reason is shown for the increase of 150 per centum since that time.

Allowing the defendant a set-off of \$100 in coin and deducting that sum from the debt due the plaintiff, leaves the sum of \$423.24. Add to this interest on the same since July 7—seven months—makes \$458.88—which is the sum due the plaintiff in coin.

But the plaintiff also objects to the allowance of this set-off, on the ground of an adverse prior adjudication as set forth in his replication.

The facts concerning the matter are these: On April 1, 1869, the defendant proved a debt for these services of the sum of \$125 in legal tender. On objection by some of the creditors, and a motion to expunge the claim from the list of proven debts, the matter was referred by the Court to the Register. In the meantime, it may be presumed that the defendant, acting upon the advice of his counsel, concluded not to press his claim to payment by the assignee, but to rely upon having it allowed in full as a set-off against the sum then in his hands belonging to the estate—at least he did not appear before the Register, but allowed the matter to go by default. Thereupon the Register reported as a conclusion of fact that said claim was for services rendered under a fraudulent and void deed of assignment to the defendant, and as a conclusion of law that it ought not to be allowed. Upon motion, and without argument, there being no opposition, on August 16, this Court confirmed this report and made an order expunging the claim from the list of debts. There the matter rested until the plaintiff brought this action, when the defendant pleaded the claim as a set-off.

Before proceeding to consider whether that order amounts

1870.]

Opinion of the Court—Deady, J.

to a final *judgment* against the claim of the defendant, it is proper to state, that the conclusion of the Register against the legality of the claim was predicated upon the case of (*Leavitt v. Yates*, 4 Ed. Ch. 205, cited in 5 Abb. Dig. 273) as deciding: That where a trust deed is pronounced void, as being contrary to law, the trustee cannot be allowed any compensation for services under it. Upon the strength of this authority, this Court made the order of August 16, rejecting the claim. I now think that order was erroneous, and upon examination of the original report of the case of *Leavitt v. Yates*, I find that it does not decide any such thing as stated in the digest. The Vice Chancellor refused to allow the trustees the salary provided in the void trust deed, but did allow the necessary expense of taking care of managing the property, while in the hands of the trustees.

These services were rendered by the defendant at the request of R. & S., before the petition filed in bankruptcy, and unless there is some established rule of law or positive statute prohibiting the payment or allowance of such a claim, I cannot now see upon what ground the right to have it allowed as a set-off is to be denied. If the defendant had notice of the act of bankruptcy—as I presume he had—under the Bankrupt Act of 6 G. 4, the claim could neither have been proved against the estate nor allowed as a set-off in an action by the assignee; but there is no such provision in the American act, and the Court must administer the law as it finds it.

I have come to the conclusion, that the order rejecting the claim of the defendant, is not such an adjudication as prevents the defendant from pleading it as a set-off in this action. The provisions of the Bankrupt Act bearing upon the question, are substantially as follows:

Section 22 provides for each creditor's making proof of his debt; and presenting the same to the assignee; it also gives the District Court power "to reject all claims not duly proved, or where the proof shows the claim to have been founded in fraud, illegality, or mistake." Section 8 gives the right of appeal from the District to the Circuit Court, to "any supposed creditor whose claim is wholly or in part rejected." Section 24 enacts in effect that such sup-

Opinion of the Court—Dedy, J.

[February,

posed creditor, upon entering such appeal in the Circuit Court, shall file a pleading as plaintiff in an action at law containing a statement of his claim, and thereafter the controversy shall proceed to determination as an ordinary action at law.

Taken together, these provisions of the act amount to this, and nothing more:

A creditor cannot demand payment of his debt until he makes and presents to the assignee, the proper proof thereof. This provision is analogous in purpose, and proceeding to the probate of debts against the estate of a decedent, before being presented to, or allowed by the administrator. When this is done, parties interested may object to the claim, and the Court—the District Judge, without a jury, in a summary manner—may reject the claim, as not being duly proved, or as being founded in fraud, illegality, or mistake. Then, and not before, the supposed creditor may bring an action in the Circuit Court against the assignee, and have his right to payment regularly tried. But this action can only be maintained by the creditor first taking an appeal from the order rejecting his claim. This appeal must be taken within a limited time, in a particular manner, and to a particular Court. The right to sue the assignee is postponed and limited to the happening and performance of these precedent circumstances and conditions. But they are not adjudications, but only proceedings preliminary to adjudication. But suppose the assignee to bring an action upon a demand due the bankrupt, cannot the defendant plead a set-off to more or less of such demand, although the same has not been proved and presented to the assignee, and rejected by the Judge, and appeal taken to the Circuit Court? It seems to me that he can. The cross-demand of the defendant in such case is proved on the trial, or it will not be allowed.

The case of *Marks v. Barker, supra*, is an instance in point where a party was entitled under the Bankrupt Act of 1800, to be allowed a claim as a set-off, which, for a technical reason, he could not have maintained an action to recover.

In this case, the defendant not having brought his action

1870. |

Syllabus.

in the Circuit Court within the term prescribed after the rejection of his claim, has lost his right to maintain a suit upon it: but, notwithstanding this, I think the better conclusion is that he may still plead it as a set-off, by way of defense to an action by the assignee. On the other hand, it may be said that a party who elects to prove and obtain his demand in the mode prescribed in Sections 22, 24 and 8, must pursue that mode to the end, and if he fails or neglects to do so, cannot afterwards have the same demand allowed as a set-off. Not that the order of rejection is an adjudication between the parties in any proper sense of that term, but that the party having elected to obtain his demand in that way, is precluded from litigating it in any other. There is force in this argument. On this point I am not confident that my conclusion is the proper one, and the question may be considered an open one in this Court, if parties wish to be heard upon it in any case that may arise hereafter.

The set-off of the defendant to the amount of \$100 in coin will be allowed, and the plaintiff must have judgment for \$458.88 in coin, with costs and expenses of the action.

In re L. H. OUIMETTE.

DISTRICT COURT, DISTRICT OF OREGON.

FEBRUARY 21, 1870.

1. DEFENCES SEPARATELY PLEADED.—Distinct defenses to a petition in bankruptcy should be separately pleaded.
2. SURPLUSAGE.—A denial of the allegation in the petition respecting the insolvency of the respondent is a sufficient answer thereto, and a further statement as to the value of respondent's assets compared with the amount of his indebtedness, is surplusage and immaterial.
3. DEMURRER—MOTION TO STRIKE OUT.—A demurrer is not the proper mode of objecting to irrelevant or immaterial allegations, or the mingling in one plea of distinct defences, but a motion to strike out.
4. DEFENSES MUST BE SEPARATELY PLEADED.—In a petition in bankruptcy, the debt and the act of bankruptcy constitute the cause of action, and the defense thereto may go to either or both of these matters, but if there are several defenses they must be separately pleaded.

Opinion of the Court—Deady, J.

[February,

5. **TENDER NO DEFENSE TO PETITION IN BANKRUPTCY.**—A plea of tender can under no circumstances be a defense to a petition to have a debtor adjudged a bankrupt.
6. **PROMISSORY NOTE, WHEN NOT PAYMENT.**—The mere delivery and receipt of the promissory note of the debtor or a third person does not constitute payment, but it must also appear that the creditor *expressly* agreed to take such note as payment.
7. **SAME.**—Where a creditor took the promissory notes of third persons from his debtor upon an agreement that they should be considered as taken in payment, if *collectable*, such creditor is bound to use ordinary means and diligence to collect such notes, and, if necessary, he must sue upon them.
8. **PETITION, WHO MAY MAINTAIN.**—A creditor whose debt is provable in bankruptcy, though not due, may maintain a petition to have his debtor declared a bankrupt.

Before DEADY, District Judge.

J. W. Whalley and Walter M. Thayer, for Petitioners.

John H. Mitchell and Joseph N. Dolph, for Respondent.

DEADY, J. This petition is brought by S. A. Frankenau *et al.* and H. Rosenfeld *et al.*

The petition states that on November 30, 1869, said Ouimette being indebted to the petitioners respectively in the sums of \$157.45 and \$144.54, on account of goods, etc., theretofore sold and delivered to said Ouimette, made and delivered to said petitioners his two promissory notes for sums respectively, payable to their several orders, sixty days after the date thereof, with interest at one per centum per month, and that said petitioners are still owners and holders of said accounts and notes, and that the sums aforesaid are respectively payable thereon. That on or about December 15, 1869, said Ouimette committed an act of bankruptcy: In that, said Ouimette being then insolvent, did sell and deliver all his stock of goods, then used by him in his business of merchant, at St. Louis, in the district aforesaid, the same being then and there of the value of \$1,500, to Pierre & Mull of the place last aforesaid, in consideration of the relinquishment of a debt of \$1,200 then due said Mull from said Ouimette, with interest, thereby to give a preference to said Mull; and with intent to hinder, delay and defraud his other creditors; and with intent to defeat

1870.]

Opinion of the Court—Deady, J.

and delay the operation of the Bankrupt Act:—Wherefore the petitioners pray that Ouimette may be adjudged a bankrupt, etc.

On February 3, 1870, Ouimette appeared and answered the petition. The answer is long and rambling. Besides the specific denials of certain allegations in the complaint, it contains two or more supposed defenses to the petition, but neither these denials or supposed defenses are separately pleaded, but on the contrary, form one continuous and mingled statement.

At common law the defendant was confined to a *single* plea consisting of a *single* matter of defense (Gould's Pleading, 426). But this rule, sometimes operating unjustly, led to the enactment of the statute of 4 Anne, C. 16, Sec. 4, which provided that the defendant, with leave of the Court, might "*plead as many several matters as he shall think necessary for his defense.*"

In the construction of this statute, it was held that it did not authorize the defendant to allege more than *one* defense in *one* plea. In other words, that each plea must still be *single* as at common law (Gould's Pleading, 429–30); and that it did not extend to dilatory pleas (Ibid, 431).

On this subject, the rule prescribed by the Code, in effect, coincides with the rule of the common law as modified by the statute of Anne. It provides that the answer shall contain a specific denial of each material allegation of the complaint controverted by the defendant, and a statement of any new matter constituting a defense or counter-claim; also, that the defendant may set forth by answer as many defenses and counter-claims as he may have; but they shall be *separately stated* and refer to the causes of action which they are intended to answer in such manner that they may be distinguished. (Or. Code, 156–7.)

After denying certain allegations in the petition respecting the indebtedness and the solvency of Ouimette and the commission of the act of bankruptcy, the answer "further alleges" that Ouimette "has property which he holds and owns in his own right over and above all debts and liabilities of the value of \$2,000." Then follows an allegation by way of "further answering said petition," to the effect that

Opinion of the Court—Deady, J.

[February,

on January 5, 1870, at the request of the petitioners, Ouimette delivered to petitioners the notes of third persons then held and owned by said Ouimette for the aggregate sum of \$285.26 principal, with interest from various dates within the year 1869, with “the agreement that said petitioners should make inquiries as to whether said notes were collectable, and if so, they are to be received by said petitioners in payment of said notes of him, said Ouimette, to said petitioners;” and that said notes, with the exception of one for the sum of \$52.26, with interest from March 16, 1869, “were good and collectable;” and that said “petitioners have never notified said Ouimette that said notes were not collectable,” but have proceeded to collect said notes and have collected some portion of the same, but what amount he is unable to state.

Then follows an allegation to the effect that, on the day when the notes of the petitioners became due, Ouimette tendered to each of said petitioners the sum due on his note respectively in United States gold coin, upon condition that said petitioners would deliver to said Ouimette said notes and the notes by him “deposited” with said petitioners; but that said petitioners refused to deliver said Ouimette said notes, or either of them; and that said Ouimette “is still ready to pay said sum upon the surrender of his said notes and deposits the same with the clerk of this Court, to be and remain a continuing tender upon the same conditions of the surrender of his said notes set forth in the petition and said notes deposited with said petitioners.” As a conclusion it is then alleged, that “by reason of the facts aforesaid, the petitioners have elected to receive the said notes deposited as aforesaid in payment of Ouimette’s said notes in the petition set forth, and that said notes are paid. Wherefore he prays that said petition may be dismissed,” etc.

The petitioners, by their attorneys, demur to all the allegations in the answer following the specific denials of the allegations in the complaint, because “said matter constitutes no defense to the proceedings in bankruptcy herein,” with special causes of demurrer also assigned.

The allegation as to the value of the property which the defendant “owns and holds” is simply surplusage and im-

1870.]

Opinion of the Court—Dedy, J.

material, and ought to be stricken out. But it is no cause for demurrer. Ouimette having denied the allegation that he was insolvent at the time of the sale of the goods to Pierre & Mull, should have rested there. Besides, if it were proper to set up the value of his assets as compared with his liabilities, to show thereby that he was not insolvent, it should have been pleaded separately.

The pleas of payment by the delivery of notes of third persons, and of tender in cash after petition filed, are run together as one story or transaction. They are distinct matters, and *if* defenses, distinct ones, and should have been pleaded separately, that is, so that each one would stand or fall by itself, without the aid of the other. On this account, this part of the answer should have been stricken out. But this objection not having been taken, for the purpose of this demurrer, these defenses or matters will be considered, in this respect, as if they had been properly pleaded.

To maintain an action to have one adjudged a bankrupt, it must appear from the petition, that the party proceeded against, owes debts provable under the Bankrupt Act, to the amount of \$300, and at least \$250 thereof to the petitioner or petitioners, and that such party has committed an act of bankruptcy. The debt and the act of bankruptcy taken together constitute the cause of action. The defense set up, may go to either or both of these matters, and there may be several defenses to each, but they must be separately stated.

The matters pleaded in the answer as a tender of the petitioner's debts after petition filed, are immaterial, and might have been stricken out as irrelevant. They constitute no defense to the action. If, as is alleged, Ouimette is insolvent, he has no right to tender or pay to these petitioners their debts in full. It would be a fraud upon his other creditors. Nor would the petitioners have any right to receive such proffered payments, because, having alleged the insolvency of Ouimette, they would be acting in violation of the Bankrupt Act, and run the risk of forfeiting their debts. On the other hand, if Ouimette did not commit an act of bankruptcy, of which insolvency is a material ingredient, it matters not, so far as this proceeding is concerned,

whether he owes the petitioners or not, or whether he tendered them the amount due then or not. This is not an action to collect a debt, but to procure an adjudication of bankruptcy against Ouimette, and therefore a plea of tender of the amount due the petitioners, can, under no circumstances, be a defense to it. The allegation of the petition, is that the party is not only indebted to the petitioners, but that he committed an act of bankruptcy with intent to evade the law and to defraud them. To this, it is no sufficient answer to allege—true, but I now tender you the amount of your debts.

In the course of the argument, counsel for Ouimette suggested, that in the absence of any allegation to the contrary, the Court might presume that the petitioners were his only creditors, and therefore, the tender might be lawfully made and received. But I do not think such a presumption would be according to the ordinary course in such matters, and therefore, it ought not to be made. If, in fact, there are no other creditors, and for that reason, a plea of tender would be a good defense to the action, the plea should have contained an allegation to that effect. The only ground upon which such a plea should be considered to constitute a defense would be, that payment by the alleged bankrupt, under such circumstances, could neither prejudice nor injure any one, and, therefore, no one could complain of it. But even then, I do not think such a plea ought to be held to be a good defense. The fact that there are no other creditors to be prejudiced by, and complain of the payment, cannot be presumed to be within the knowledge of the petitioners. Before they accept the tender, they must inquire concerning it, and they may be mistaken. Besides, no understanding of the petitioners, or proceeding between them and the alleged bankrupt upon such question, could prevent third persons, who might be creditors, from asserting their rights as such.

Treating this portion of the answer as frivolous and immaterial, there remains to be considered the allegation, which in effect amounts to a plea of part payment in the promissory notes of third persons. It will be observed that the plea does not state whether or not these notes are nego-

1870.]

Opinion of the Court—Dedy, J.

tiable, or whether or not they are endorsed by Oulmette to the petitioners. For the purposes of the demurrer, I will assume that the notes are negotiable, and that they were so transferred to the petitioners, as to authorize them to sue and collect them as owners.

There is no question but what, with the consent of the creditor, payment of a preëxisting debt, can be made in the promissory note of the debtor, or that of a third person. But there is some disagreement in the decisions as to what is sufficient evidence of such consent.

In Massachusetts it is held that the delivery and acceptance of the note is sufficient evidence that it was received in payment, and it will be so determined, unless it is clearly shown, that such was not the intention of the parties. (*Thatcher et al. v. Dinsmore*, 5 Mass. 302; *Manerly v. McGee et al.*, 6 Mass. 145; *Isley v. Jewett*, 2 Met. 173.)

In New York and other States and in the National Courts, it is held that the mere delivery and receipt of the note do not constitute payment, but it must also appear that the creditor *expressly* agreed to take it as payment. Without such agreement being shown, the delivery of the note is only a conditional payment—a payment provided that the note is paid when it becomes due. It is, however, to be deemed an absolute payment if the creditor parts with or is guilty of negligence in presenting it for payment or the like; but it seems he is not bound to sue upon it. (*Tobey v. Barber*, 5 John. 72; *Johnson v. Weed*, 9 John. 311; *Booth v. Smith*, 3 Wend. 168; *N. Y. State Bank v. Fletcher*, 5 Wend. 87; *Olcott v. Rathbone*, Ibid. 492; *Jones v. Savage*, 6 Wend. 662; *Lyman et al v. The Bank of the U. S.*, 12 How. 243; *Downey v. Hicks*, 14 How. 249.) The latter rule is the one which must prevail in this Court.

The delivery of the notes to the petitioners, under the circumstances stated in the plea amounted to a conditional payment. If the notes were paid or collected according to their tenor, the debt of the petitioners would be paid and extinguished. If they were not so paid or collected, and the petitioners were not guilty of negligence in the premises, the delivery would amount to nothing.

The conditions upon which the notes were taken by the

petitioners as stated in the plea, differ, I think, in one particular from those which the law would attach to the transaction in the absence of any special agreement between the parties.

The petitioners having agreed to take the notes as payment if they were collectable, thereby bound themselves to sue upon them if necessary to their collection. An agreement to take notes as payment if they are or prove collectable, implies something more than to so take them if they are paid. It is equivalent to an agreement to collect them, so far as the same can be done by the use of ordinary means and diligence.

I know it was said in the argument, that the petitioners only agreed to take these notes as payment if, upon inquiry, they found them collectable—that is, would admit or consent that they could be collected; and that until it appears that such consent was given, the delivery of the notes has no effect upon the rights of the parties whatever. Such may be the mere literal sense of the contract or condition as stated in the plea, but I do not think that it ought to be so interpreted or that the parties so understood it. If the notes were not to be considered payment unless the petitioners assented to the conclusion that they were collectable, they might, if they chose, refuse that assent when it was plain that the payers were solvent and abundantly able to pay them. If the notes were in fact collectable whatever the petitioners might say or do in the premises, from the date of their delivery they were so far payment of their debts.

Now it is averred in the plea that over \$200 of these notes are collectable; and that the petitioners have collected part of them. If so, they are so far a payment of the petitioners' debts, and the balance being less than \$100 would not be sufficient in amount to enable the petitioners to maintain this action. This, it seems to me, is a good defense to the action, or matter in abatement of it.

It may be said that, although the notes are collectable, that the petitioners, having now knowledge of the insolvency of Ouimette, cannot collect them and apply the contents on their notes, without thereby taking a preference contrary to

1870.]

Opinion of the Court—Dedy, J.

the act and running the risk of forfeiting their debts to the other creditors. But I do not think this argument sound. If the money due on the notes is received by the petitioners at any time, as between them and third persons, in contemplation of law it is received at the time of the delivery of the notes—the conditional payment. In other words, the actual receipt of the contents of the notes by the petitioners relates back to the conditional payment, and converts it into an absolute one. The question of preference then, in the receipt and collection of these notes by the petitioners, would have to be determined by the facts as they existed when the conditional payment was made. If as between the petitioners and third persons the former were justifiable in receiving these notes when they did in payment of their debts, then they became the owners of them, and their right to collect and receive the money on them at any subsequent time, cannot be affected by the fact that Ouimette has since become insolvent or that they have since learned or have good reason to believe that he was then insolvent.

The facts stated in the plea show a part payment of the petitioners' debts; and the sum remaining due—being less than \$250—does not enable the petitioners to maintain this action. The plea is, therefore, a good defense to it and the demurrer must be overruled.

If this conditional payment has in fact turned out to be no payment, by reason of the notes proving worthless or uncollectable, notwithstanding the due diligence of the petitioners, they should reply to the plea, and on the trial of the issue produce the notes and surrender them to Ouimette.

It is not necessary to more than notice the allegation of the plea that the petitioners by refusing the alleged tender, then elected to take the notes as payment. At that time the petitioners were no more at liberty to receive the notes in payment than the cash. On the argument, counsel for Ouimette made the point, that the petitioners could not maintain this action, because it was brought before their debts were due. But this objection, if made at all, should have been made by demurrer to the petition. However, I am satisfied that the objection is not tenable, as a reference

Statement of Facts.

[March,

to the statute will show. By Section 39 of the Bankrupt Act it is provided that "any person" * * * may "be adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose debts provable under this act amount to at least \$250." Section 19 provides: "that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and *all debts then existing but not payable until a future day* * * * may be proved against the estate of the bankrupt."

These provisions seem to settle the question. The debts of the petitioners, although not then due, existed at and before "the adjudication of bankruptcy," and were therefore *provable* debts. Being *provable* debts they were sufficient to maintain the petition. An order will be entered overruling the demurrer, with leave to the petitioners to reply upon the payment of \$5 costs.

In re E. G. RANDALL AND JOHN SUNDERLAND.

DISTRICT COURT, DISTRICT OF OREGON.

MARCH 7, 1870.

1. DISPOSITION OF PROPERTY BY DEBTOR AFTER PETITION IN BANKRUPTCY NOT A PREFERENCE.—A payment or other disposition of property by a debtor after petition in bankruptcy filed against him, is not a preference within the meaning of Sections 23, 35 and 39 of the Bankrupt Act, but simply an unlawful meddling with the property of the assignee, and therefore a nullity.
2. WHAT CONSTITUTES A PREFERENCE.—What constitutes a preference under the Bankrupt Act, and where the taking of a preference will work a forfeiture of the debt of the creditor taking the same.
3. OBJECTION TO PROOF OF DEBT.—BY WHOM MADE.—Objection to the proof of debt must be made by the assignee, unless the Court for cause otherwise directs.

Before DEADY, District Judge.

On January 9, 1869, Randall and Sunderland being insolvent assigned all their property to Foster with intent to evade the Bankrupt Act. On January 30, the firm of Einstein Bros. & Co., doing business in San Francisco, filed a

1870.]

Opinion of the Court—Deady, J.

petition in bankruptcy in this Court against R. and S., praying that they might be adjudged bankrupts on account of such assignment; and on February 27, after a hearing upon the petition and answer thereto, R. and S. were duly adjudged bankrupts for the causes stated in the petition.

Afterwards, Einstein Bros. & Co. having proved their debt, amounting to \$6,183.56, Winfield Peters, a creditor who had also proved his debt, moved the Court to reject the claim of Einstein Bros. & Co. for reasons stated in his objections, then filed thereto. Thereupon an order was made referring the matter to Mr. Register Hill with leave to Einstein Bros. & Co. to answer the objections within a certain time.

Before the register, Einstein Bros. & Co. answered the objections to their claim, and the objecting creditor demurred to such answer.

The register reported, in effect, that the objections were not well taken, and that the motion to eject ought not to be allowed.

E. D. Shattuck, for motion.

Lansing Stout and *D. Freidenrich*, contra.

DEADY, J. This is a motion by a creditor to reject a claim of another creditor, as being illegal.

From the report of the register it appears that on February 2, 1869, Einstein Bros. & Co. received at San Francisco, \$450, in coin, from Foster on account of R. and S., and that they had good reason to believe at that time that R. and S. were insolvent; and that their attorney, then resident in Portland, acting under instructions to take such course as their interests required, had on January 30, commenced the proceedings in bankruptcy wherein R. and S. were adjudged bankrupts; and that before the objections of said Peters were filed said Einstein Bros. & Co. had offered in writing to surrender to the assignee of the estate of R. and S. the said sum of \$450, and that afterward they paid said sum to said assignee.

For the objecting creditor it is claimed that this case comes within section 39, and that therefore the debt is forfeited and should not be proved.

Opinion of the Court—Deady, J.

[March,

That section provides, among other things, that an insolvent debtor who makes any payment with intent to give a preference to one or more creditors, shall be deemed to have committed an act of bankruptcy, and upon the petition of certain creditors may be adjudged a bankrupt therefor—“provided such petition is brought within six months after the act of bankruptcy shall have been committed. And if *such debtor* shall be adjudged a bankrupt, the assignee may recover back *the money or other property so paid* * * * provided, the person recovering *such payment* * * * had reasonable cause to believe that a fraud on this act was intended and that the debtor was insolvent, and *such creditor* shall not be allowed to prove his debt in bankruptcy.” In the case under consideration the payment was made *after* the petition was filed and therefore not within six months prior thereto. Neither was such payment the act of bankruptcy on account of which such petition was brought and adjudication had.

Taken as it reads, this section does not include the case of a payment after petition brought. In morals, I admit that there is no difference between a creditor who takes a preference before petition filed or afterwards, and on this ground it has been argued for the motion to reject that as this preference is within the mischief intended to be prevented by the section, it should be construed so as to include it. If the premises were admitted the conclusion might follow.

So far as the creditor is concerned, a payment or transfer of property by a debtor, after petition brought, is a mere nullity, and the same or its value may be recovered back by the assignee, independent of Sections 23, 35 or 39, because from the commencement of the proceedings in bankruptcy, by operation of law, the property of the bankrupt of whatever nature, not exempt from execution, vests in the assignee, and therefore the former can make no valid disposition of it. (Sec. 14, B. Act.) Einstein Bros. & Co. acquired no property or interest in the money paid or delivered them by Foster. They were mere bailees of it, and the assignee could have compelled them to return it or its value, without reference to their claim against the estate. Besides this,

1870.]

Opinion of the Court—Dedy, J.

the debtor making a payment or transfer after petition brought, is liable to be punished by imprisonment at hard labor for not exceeding three years. (Sec. 44, B. Act.)

A payment or other disposition of property by a debtor after petition brought against him is not a preference within the meaning of the act, but simply an unlawful meddling with the property of the assignee. It confers no rights or interest on the party receiving it, and renders the debtor liable to imprisonment.

Preferences are provided for in Sections 23, 35, and incidentally in 39.

By 23, a person receiving a preference “*any time after the approval of the act*” having reasonable cause to believe that the same was made or given by the debtor contrary to the act, shall not prove the debt on account of which such preference was given, until he surrenders to the assignee all benefit received by him under such preference. By its terms this section includes all preferences *whenever made or given*, and leaves it optional with the creditor to surrender and prove his debt, or retain his preference and be excluded from making such proof. But as will be seen, Section 35 necessarily limits the operation of this section to cases of preference received more than six months prior to petition brought, because Section 35 declares all preferences made within this latter period absolutely void; and as by Section 14 all the property of the bankrupt is vested in the assignee from the time of filing the petition against him, this section cannot be construed to apply to the case of a payment or other disposition of property by the bankrupt after such filing, because the same would be void for want of interest in the bankrupt, and could not give the creditor the option to surrender or retain it.

By 35 all payments or other disposition of property by an insolvent debtor, made “*within six months before the filing of the petition by or against him*” are declared void, and the assignee may recover the same as assets of the bankrupt. .

All payments or other dispositions of property within the purview of this section are void, and the person or creditor receiving them cannot retain or surrender them at his option, as in the case of a preference within the purview of Section

23; but no penalty is imposed upon him for receiving the same.

Section 39 goes farther, and after providing for what causes and under what conditions a debtor may be adjudged a bankrupt, declares that the creditor receiving the preference, and thereby participating in the fraud which constituted the act of bankruptcy for which the adjudication was had, shall not be allowed to have his debt.

In re Princeton (1 Law Times, 125), Mr. Justice Miller, of the Wisconsin District, suggests the reason why Section 39 imposes a forfeiture of the debt upon the creditor taking a preference, contrary to it. He says:

“This prohibition as to the creditors (forbidding the proof of their debts), is predicated on the adjudication in bankruptcy upon the allegation in the petition against the debtor. And the creditor, having reasonable cause to believe the alleged violation of the act by the debtor, is considered a *participant in the offense against the act*, and is, therefore, prohibited from proving his debt in bankruptcy.

* * * It cannot be permitted to a creditor, who, with reasonable cause of knowledge, has participated in such fraud on the act *as to found a proceeding against his debtor*, to relinquish his intended preference, and claim to prove his debt under the 23, or any other section of the act.”

This reasoning seems to assume, rather than to assert, that the forfeiture imposed by this section is confined to the case of a creditor who received a preference which constituted the very act of bankruptcy upon which the adjudication was had.

The language of the last clause of the section gives some color to this conclusion. It declares—“the assignee may recover back *the money* or other property *so paid*, conveyed, sold, assigned or transferred, contrary to this act”—that is the money paid by the insolvent debtor to the creditor, with intent to give a preference, and which payment constituted the very act of bankruptcy in controversy;—“provided the person receiving *such payment* * * * had reasonable cause to believe, etc., * * * and *such creditor* shall not be allowed to prove his debt, etc.” Apparently, these expressions—“the money”—“so paid”—“such payment” and

1870.]

Opinion of the Court—Dedy, J.

“such creditor,” relate or refer to the money or payment which constituted the act of bankruptcy for which the petition was brought, and to the person or creditor who received such money or payment, and thereby became a participant in the fraud for which the debtor was adjudged a bankrupt.

But I am not satisfied that the clause should be so limited in its operations. Indeed, it appears but just and reasonable that it should apply to any creditor who has taken a preference “contrary to the act,” within six months before petition brought, although such preference did not constitute the act of bankruptcy for which the adjudication was had, provided the person receiving such preference, does not voluntarily relinquish the same, but puts the estate to the trouble and expense of recovering the property, or its value, by legal proceedings. The reasons for forfeiting the debt in the case supposed, are equally as cogent as any that can be given in the case of the creditor whose preference constituted the act of bankruptcy. In each case, the creditor’s conduct has been illegal, and in addition to this, innocent parties have been thereby put to unnecessary trouble and expense, to obtain their rights.

It may be necessary, to support this view of the section, that the words of the last clause—“*the* money or other property so paid, etc,”—should be construed to read—“*any* money or other property so paid, etc.”

However this may be, one thing seems certain. This case is not within any of these sections, regulating the subject of preferences. From what appears in the case of R. & S., I suppose that Foster sent this money in the course of business, to Einstein Bros. & Co. before petition filed, and that the latter received it afterwards from the express, without knowledge of such filing—the petition having been brought by their attorney. They could not well help receiving the money from the express, but as soon as they could conveniently, they delivered it to the assignee.

The motion to reject the claim, must be denied at the cost of the objecting creditor.

It will be observed that this proceeding is not taken by the assignee, but by a creditor. No objection has been made to it upon that ground, and for the present, it may

be considered as well taken. But upon reflection, I am quite satisfied that the act does not contemplate that every creditor shall have the right to object to every other creditor's claim. This, it appears to me, is the proper business of the assignee, who represents the estate, and all parties interested. Otherwise, the door is opened wide to any and every petty, factious creditor, who cares more for controversy than for his debt, to delay and harrass the substantial creditors, and unnecessarily prolong the settlement of the estate.

Sufficient guards are thrown around the choice of an assignee, and his administration of the bankrupt's property, to justify his being entrusted, in the first instance at least, with the duty of ascertaining what claims require further investigation, and what do not. Again, if any creditor felt himself aggrieved by the action of the assignee in this respect, he might apply to the Court for a rule upon the assignee, requiring him to take the proper action in the premises, or to allow the creditor to do so in the name of the former. The Court has a supervisory control over the assignee, and when "necessary or expedient," may remove him (Sec. 18 Bankrupt Act.)

Section 23 provides for the postponement of the proof of the claim, before the election of assignee, but the only provision of the act on the subject under consideration, is found in the last clause of Section 22. It reads:

"The Court may, on the application of the assignee, or of any creditor of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, *and shall reject all claims not duly proved, or when the proof shows the claim to be founded in fraud, illegality or mistake.*"

This only gives a creditor a right to apply for leave to examine the bankrupt or other creditor on oath, touching any matter pertinent to his interest in the estate. The Court is required "to reject all claims" of a certain character, but at whose instance is not specifically prescribed. It may be that the Court—*ex mero motu*—may reject a claim or may

1870.]

Syllabus.

direct an inquiry concerning the legality of the same. But as between third persons, the analogies of other similar legal proceedings, as in the case of an administrator, and the speedy and economical settlement of bankrupts' estates, all point to the assignee as the proper person to make the application or objection. If the contrary course were permitted, there would be danger of the proceedings degenerating into a many-sided, interminable squabble between the creditors, to the real benefit of no one, and the delay and injury of all concerned.

JAMES B. NEWBY *v.* THE OREGON CENTRAL RAILWAY CO., GEORGE L. WOODS, E. N. COOKE, J. H. DOUTHITT, J. R. MOORES, THOMAS McF. PATTON, J. H. MOORES, JACOB COURSER, A. LAWRENCE LOVEJOY, F. A. CHENOWETH, STUKELEY ELLSWORTH, STEPHEN F. CHADWICK, JOHN E. ROSS, J. H. D. HENDERSON, JOHN F. MILLER, ABSALOM F. HEDGES, SAMUEL B. PARRISH, AND GREEN B. SMITH.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH 8, 1870.

1. IN EQUITY, NOTICE OF FILING PLEA OR DEMURRER MUST BE ENTERED IN ORDER BOOK.—In equity a party does not take notice of the filing of a plea or demurrer, unless notice thereof be entered in the order book, as prescribed by Equity Rule 4.
2. NATIONAL COURTS DO NOT DISCOURAGE SUITORS FROM SEEKING REDRESS IN THEIR TRIBUNALS.—There is no rule of law or public policy which requires the National Courts to discourage suitors from seeking redress in those tribunals, and parties have a clear right to become the owners of property for the express purpose of maintaining a suit in such courts concerning the same.
3. PLEAS IN EQUITY.—NATURE OF.—Plea in equity, nature of in bar and abatement and where double allowed.
4. WHEN STOCKHOLDER OR CREDITOR OF CORPORATION CAN MAINTAIN SUIT FOR INJURY TO CORPORATE RIGHTS.—A stockholder or creditor of a cor-

Opinion of the Court—Deady, J.

[March,

poration cannot maintain a suit for an injury to the corporate rights, unless it appears from the bill that the corporation refused to take proper measures to protect or redress the same.

5. INABILITY TO SUE NO TEST OF LIABILITY TO BE SUED IN NATIONAL COURTS.—The inability of a party *to sue* in the National Courts, in a particular case, is no test of his liability *to be sued* in them under other circumstances.
6. OWNER OF CORPORATION BONDS SAME RIGHT TO SUE AS STOCKHOLDER OF CORPORATION.—The owner of corporation bonds secured by a lien upon lands claimed by the corporation, has the same right as a stockholder of such corporation to maintain a suit to prevent another corporation from obtaining such lands by the wrongful use of the name of his corporation.
7. CORPORATION NOT LIABLE TO ITS STOCKHOLDERS OR CREDITORS FOR ERROR OF JUDGMENT.—In choosing between remedies deemed equally effective, a corporation has a right to exercise its judgment, and for an error in this respect neither its stockholders or creditors can call it to an account.

Before DEADY, District Judge.

Wm. Lair Hill, for Complainant.

John H. Mitchell, for Defendants.

DEADY, J. This suit was brought to enjoin the defendants from using the name of the complainant's corporation—The Oregon Central Railway Company—and particularly from issuing bonds in the name of said corporation. It is alleged in the bill that the complainant is the owner and holder of two of said corporation's bonds, of the denomination of \$1,000 each, and that for reasons stated in the bill, the use of such name by the defendants and the issuing of such bonds by them, do and will depreciate the market value of complainant's bonds to his damage not less than \$1,000.

At the May term, 1869, the cause was heard on demurrer to the bill. On the argument a cause of demurrer was assigned *ore tenus*:—"That it does not appear from the bill that the complainant's corporation had refused to institute this suit, and therefore it should have been brought in the name of said corporation."

On August 3, 1869, the Court sustained the demurrer as above assigned, and decided that the complainant's corporation must be made a party to the suit; and that if such corporation, after request by the complainant, refuses to

1870.]

Opinion of the Court—Deady, J.

bring such suit, the latter may allege such refusal in his bill, and make the corporation a party defendant. (1 Deady, 609.)

Afterwards the complainant had leave to amend his bill, which he did, by making his corporation a party defendant thereto, and by alleging "that before commencing this suit your orator requested the said defendant corporation, whose bonds your orator holds and owns, as aforesaid, to bring this suit for his protection, and the said last named corporation refused so to do, and do still refuse to protect the rights of your orator aforesaid."

To the bill as amended, the natural persons named therein as defendants, demurred. The corporation charged with the wrongful use of the corporate name, filed two pleas to distinct portions of the bill and demurred to the remainder. The complainant's corporation made default.

On January 4, 1870, the defendants moved to dismiss the bill under Equity Rule 38, because the complainant had not replied to the pleas, or set down the same, or the demurrers, for argument. The motion was denied, because it did not appear that the complainant had notice of the filing of such pleas or demurrers, by entry in the order book, as prescribed in Equity Rule 4. Afterwards, by consent of parties, the pleas and demurrers were set down for argument.

On the argument, the cause was submitted on the part of the complainant, with an admission as to the sufficiency of the second plea. The defendants filed a written brief in support of both pleas and demurrers.

Both pleas are voluminous and full of details, and are pleaded as pleas in abatement.

In effect, the first one alleges that the complainant is not the real owner of the two bonds mentioned in the bill, but that the same were merely transferred and delivered to him by a director of this corporation, for the sole purpose of enabling him to maintain this suit in this Court, for the benefit of, or in behalf of such corporation.

If, notwithstanding the rhetorical exaggerations of this plea, it appears that the complainant has the legal title to, or interest in these bonds, then this plea is insufficient. They are payable to bearer and the title to them passes by

Opinion of the Court—Deady, J.

[March,

delivery, unless the contrary is shown. The motive with which they were delivered to the complainant or he received them makes no difference in this respect. Parties have a clear right to become the owners of property real or personal, by purchase or gift, for the express purpose of maintaining a suit in this Court concerning the same. In some of the earliest cases there are some dicta to the contrary of this, but their authority has not been recognized. Admitting all that can be claimed for the plea, and probably more than ought to be, it only amounts to an allegation that the father of the complainant delivered him these bonds as a gift, with the mutual understanding or expectation that the latter would commence and maintain this suit as the owner thereof. In all this there was nothing illegal or immoral or fraudulent. There is no rule of law or public policy which requires the National Courts to discourage persons from seeking redress in those tribunals in every case where the constitution and laws fairly construed will permit it. This plea, I think, should be held insufficient.

The second plea alleges that it is not true that the complainant, before bringing this suit, requested his corporation to bring the same for his protection; and also, that prior to the commencement thereof, such corporation did commence a suit in the Circuit Court for the county of Marion, to enjoin the defendants herein from using such corporate name and from issuing such bonds, and that such suit is still pending in said Court, and being prosecuted therein in good faith, by said complainant's corporation.

Before disposing of this plea, I propose to call attention to the impropriety of pleading double in this case.

A plea in equity is a special answer showing why the suit should be dismissed, delayed or barred, and that, therefore, the complainant ought not to have the answer of the defendant to the matters stated in the bill. It may consist of matter *dehors* the bill—new matter—then called a pure plea or of denials of some of the substantial matters set forth in the bill. (Story's E. P., 649, 651.) Two matters of defense cannot be stated in one plea, nor should a plea contain various facts, unless they are all conducive to a single point,

1870.]

Opinion of the Court—Deady, J.

which constitutes a single defense. Otherwise it is open to the charge of duplicity and multifariousness. (Story's E. P., 653-6.) Two pleas in a suit are never allowed, even in bar, except in a particular case, by leave of the Court first obtained, where great inconvenience might otherwise be sustained. A plea is not the only mode of defense to a suit in equity. It is only allowed for the purpose of enabling a defendant to make a defense upon some single point or matter, and thereby avoid the expense, delay and inconvenience of answering the bill in detail. But if the defendant is allowed to plead several pleas to as many parts of the bill, and thereby put the whole or any great part of it in issue, nothing is gained in this respect, but rather the contrary. (Story's E. P. 657; *Didier v. Davidson*, 10 Paige, Ch., 515; *Saltus v. Tobias*, 7 John. Ch., 215; *Lamb et ux v. Starr et al.*, 1 Deady, 365.)

Nor do I think the first plea is a plea in abatement. It is an allegation that the complainant has no property in the bonds, and is, therefore, without interest in the subject matter of the suit. Such a fact, or facts showing this conclusion, may be pleaded in bar of the suit. (Story's E. P. 728.) A plea of bankruptcy of the plaintiff, being in effect a plea that the plaintiff has no title, so far as he is concerned, is a plea in bar. (Ibid, 726.)

But as no steps have been taken to strike out these double pleas or compel the defendants to elect which one they will rely upon, and as the complainant on the argument practically admitted the sufficiency of the second plea, it will be assumed for the present, that the defendants in filing the second plea abandoned the first.

In accordance with the opinion expressed at the hearing on the original bill and demurrer thereto, this second plea is sufficient and constitutes a good defense to the suit. By it the defendants controvert the allegation of the amended bill, that the complainant's corporation had refused to bring this suit for the protection of his interests.

This is a plea to the person in the nature of a plea in abatement, and corresponds to the dilatory plea of the civil law. It does not dispute the validity of the rights which

Opinion of the Court—Deady, J.

[March,

are made the subject of the suit, nor the plaintiff's interest therein, but objects to the complainant's present ability to maintain a suit concerning them (Ibid, 706-7).

Since the decision of this Court sustaining the demurrer *ore tenus* to the original bill, I have received the opinion (in sheets) of the Supreme Court in the case of "*The City of Memphis et al. v. Dean*" (8 Wal. 64.) In this respect the case is very similar to the one under consideration, and the Court then held that a stockholder could only maintain a suit to protect his interest in the corporate property where the corporation refuse to do so. The defense in that case was the same as in this—a denial of the allegation that the corporation had refused, but that, on the contrary, they were then maintaining a suit for that purpose.

The complainant having signified his intention not to contest the plea upon the proof, it follows that the bill must be dismissed, because of the complainant's inability to sue.

In this view of the matter it is not necessary to pass upon the several demurrers of the defendants; but their counsel is urgent that the Court shall decide the questions raised by these demurrers.

Upon looking at the demurrer of the corporation, I find that all the questions made by it were decided adversely to the defendants on the demurrer to the original bill, except the objection that the complainant's corporation is not a proper party defendant. The reason given in support of this objection is, that such corporation being a citizen of this State could not have maintained this suit against these defendants, who are also citizens of this State.

The facts are admitted, but the conclusion does not follow. The inability of a party *to sue* in this Court is no test of his liability *to be sued* in it. While a suit cannot be maintained in this Court *by* a citizen of the State *against* a citizen of the State, yet every such citizen is liable *to be sued* in this Court by a citizen of another State. So, while it is true that the complainant's corporation cannot sue the defendant corporation in this Court, because of their common citizenship, yet it is equally true, that the complainant being a

1870.]

Opinion of the Court—Deady, J.

citizen of California may sue either or both of these corporations in this Court. The questions are different and have no sort of relation to or dependence upon one another. (*Woolsey v. Dodge*, 18 How. 345-6.) In this case, and in *The City of Memphis et al. v. Dean, supra*, the complainant's corporation was a citizen of the same State with the other defendants and could not have maintained a suit in those Courts against its co-defendants, yet in both cases such corporation was made a party defendant.

All the questions specially made by the demurrer of the other defendants have also been decided adversely to them. But, under the general allegation of this demurrer, "that the amended bill does not state facts sufficient to constitute a cause of suit," in the written argument of counsel for defendants it is specially maintained that the complainant has not a sufficient interest in the subject matter of the controversy to enable him to maintain this suit: and that the refusal of the complainant's corporation to bring *this* suit for this protection is not such a breach of trust or neglect of duty, as gives the complainant a right of suit.

The first of these objections—the want of interest in the subject matter—was considered by Court in disposing of the demurrer to the original bill. It was then held, that the complainant, being the owner of the corporation bonds, was its creditor, and that if he had a lien upon the lands of the corporation, as a security for the payment of such bonds, he has as much interest in the subject matter as a mere stockholder, and might, for the same reasons, maintain this suit, "to prevent another corporation from obtaining the same land by the wrongful use of the name of the corporation whose bonds he holds," (*Bradley v. Richardson*, 2 Blatch. 345). As to whether it sufficiently appeared from the bill, that the complainant had such a lien, the Court was not clear, and did not decide; and no reason is shown why there should be any other or different conclusion at this time.

The complainant also maintained his right to bring this suit to protect his interest in the bonds of the corporation, as a species of property, having a conventional market value depending upon the probable resources and prospects of

Syllabus.

March,

the corporation that issued them. Upon this point, the Court, on the demurrer to the original bill, expressed no opinion, and I do not deem it necessary to do so now.

As to the second of these objections—the refusal of the complainant's corporation to bring this suit. I think it is well taken. The allegation is not sufficient to enable the complainant to sue. It was impossible for such corporation to have brought this suit—being a citizen of the same State with the defendants. But, admitting that complainant's corporation might have brought this suit, and refused, it does not follow that it refused to bring any suit—for instance, a suit in the State Court. In choosing between remedies, which are presumed to be equally effective, the corporation has a right to exercise its judgment. For an error in judgment in this respect, neither stockholders, nor creditors can sue the corporation, or call it to account. (*Woolsey v. Dodge*, 18 How. 341.) But as has been said, the complainant's corporation could not have brought this suit. The law of the land did not permit or authorize it, and therefore, its refusal to do so when requested by the complainant, was neither a neglect of duty nor breach of trust, which gave the complainant a right of suit. The allegation is insufficient, and the amended bill in this respect, is no better than the original one.

Both on the ground of the sufficiency of the second plea (the plaintiff not desiring to contest the matter upon the proof), and this cause of demurrer, the bill must be dismissed.

JOSEPH BACHMAN, *Trustee of Kattenhorn*, v. H.
EVERDING AND EDWIN BEBEE.

DISTRICT COURT, DISTRICT OF OREGON.

MARCH 21, 1870.

1. PLEAS, WHEN MAY BE STRICKEN OUT.—A plea false upon its face, may be stricken out, but this falsity cannot be shown by comparing it with another plea or defense in the same answer.
2. SAME.—A plea which expressly, or in effect, admits the plaintiff's cause of action, cannot be stricken out as frivolous.

1870.] Opinion of the Court—Deady, J.

3. SAME.—A motion to strike out is not allowed, if matter properly pleaded is included in it.
4. SEPARATE PLEAS CANNOT HELP OR DESTROY ONE ANOTHER.—A defendant may plead separately as many distinct defenses as he may have, and one cannot be taken to help or destroy the other.

Before DEADY, District Judge.

J. W. Whalley, for motion.

Erasmus D. Shattuck, contra.

DEADY, J. This is an action for money had and received. It was commenced February 24, 1870. The complaint alleges that on August 28, 1869, Kattenhorn was adjudged a bankrupt in this Court, and that, thereafter, such proceedings were had thereon, that the plaintiff on October 14, 1869, was confirmed by this Court as trustee of said estate, and is still such trustee; and that said defendants on September 4, 1869, received from the firm of Everding & Co., of San Francisco, \$374.47 gold coin, for the benefit of said bankrupt's estate, and to the use of this plaintiff; and afterwards, the plaintiff demanded payment of said money from said defendants, which demand defendants refused, and that, by virtue of the premises, there is now due to the plaintiff the sum aforesaid, in gold coin.

On March 2, defendants demurred to complaint, because the same did not state facts sufficient to constitute a cause of action.

After argument the demurrer was overruled; and on March 10, the defendants filed an answer. The answer contains two separate pleas or defenses:

First—A denial that the defendants on, etc., received the sum aforesaid or any other sum from Everding & Co., of San Francisco, or “that the same or any other sum was received by them for the benefit of the estate of said Kattenhorn, or for or to the use of the plaintiff.”

Second—That said Everding & Co., about September 4, 1869, did “credit to defendants the said sum of \$374.47, received by them from the sale of property belonging to Kattenhorn before his bankruptcy, “which property was

sold by E. & Co.” before August 28, 1869; and that about said day in September “said sum of \$374.47 of *the proceeds of said sale* was placed to the credit of these defendants by said E. & Co.”

On March 14, plaintiff moved to strike out the answer and for judgment, which motion was then argued and submitted.

The grounds specified in the motion to strike out are that the answer is sham and frivolous. In argument, counsel maintained that the first plea was shown to be false by the second one. That both could not be true. That the second one admitted what the first one denied—the receipt of the money belonging to the estate of which the plaintiff is trustee; and that the second one being in contemplation of law an admission of the cause of action, is therefore frivolous.

Under the Code, as under the Statute of 4 Anne, a defendant is entitled to plead as many defenses to an action as he may have; and one cannot be taken to help or destroy another, but each must stand or fall by itself. (Gould’s Plead. 432; *Jackson v. Stetson*, 15 Mass. 58, *n. a.*; *Bell v. Brown*, 22 Cal. 671; *Ketcham v. Zerega*, 1 E. D. Smith, 560).

A plea is called sham when it is palpably false on its face. But this falsity cannot be shown by comparing it with another plea or defense in the same answer. Otherwise the privilege of pleading several defenses would, in practice, be restricted within very narrow limits, for fear of one being considered by implication of law to contradict the other. The admissions in each plea or defense, if any, are to be taken as made only for the purpose of the issue made or tendered by it.

In this view of the matter, there is no ground for saying that the first plea is false and therefore sham. It is a mere denial that the money was received to the use of the plaintiff, and for aught that appears may be true. Besides, the motion being to strike out the whole answer as sham, is too broad. A motion to strike out, like exceptions for impertinence in chancery, is not allowed, if any of the matter included in it is properly pleaded.

1870.]

Opinion of the Court—Hillyer, J.

The application to strike out the whole answer on the ground that the second plea is frivolous, is open to the same objection.

Nor do I consider such second plea frivolous. Admit the claim of the plaintiff, that the plea is merely an admission that the money in question was received by the defendant to plaintiff's use, may not a party defendant expressly admit the plaintiff's cause of action by his answer, as well as impliedly so by *nil dicit*—a failure to answer?

Where no other defense is made than by a plea which the plaintiff conceives to be in legal effect a confession of the cause of action, he should move for judgment on the pleadings, and not to strike out. Motion denied with costs.

In re GEORGE ELDER.

DISTRICT COURT, DISTRICT OF NEVADA.

MARCH 28, 1870.

1. **PROOF OF CLAIM—PARTICULARS.**—Upon proof of a claim in bankruptcy, the particulars of the consideration must be stated in the deposition.
2. **COIN DEMAND.**—A demand by its terms, payable in gold coin, should be proved according to its terms.
3. **FRAUDULENT PREFERENCE.**—Where a creditor has attempted to obtain a preference over other creditors, by fraudulently increasing the amount of his claim, the whole claim will be rejected.
4. **STATUTE CONSTRUED.**—Section 22, Bankrupt Act of 1867, construed.

Before HILLYER, District Judge.

PETITION in bankruptcy proceeding, to have claim of a creditor disallowed and rejected.

R. S. Mesick, for petitioners.

T. H. Williams and *W. E. F. Deal*, for respondents.

HILLYER, J. George Elder was adjudged a bankrupt on his own petition, on the thirtieth day of October, A. D., 1869.

On the twenty-fifth of November, Henry Vansickle made

proof before the Register of a debt against Elder's estate amounting to \$17,025.49. No objection to the proof was made before the Register.

Subsequently, the Register being about to transmit the list of claims proved to the assignee, for the purpose of paying a dividend declared, Randall & Fox, two creditors of the estate, petitioned this Court to have the claim of Vansickle disallowed and rejected, except as to the sum of \$126.20, upon the following alleged grounds, viz:

1. That the deposition of Vansickle, made in proof of his claim, does not state or set forth any consideration for any portion of said claim, except said \$126.20.

2. That said claim is founded in fraud and illegality; in this, that there was not due said Vansickle, at the time of making his proof, from said bankrupt, or said estate, any sum above \$6,000, and that this was well known to Vansickle when he swore to his proof.

Upon the day set for hearing, Vansickle, by leave of the Court, amended his proof by stating, or purporting to state, a consideration for his claim. To the amended proof, Randall & Fox urge the same objections made against the original.

The objection to the original proof was well taken, and the claim must have been rejected if it had not been amended.

The bulk of the claim is evidenced by eight promissory notes, and the statement of the consideration for which the first note was given, is as follows:

“That between the thirteenth day of April, A. D., 1865, and the thirteenth day of April, A. D., 1866, deponent sold and delivered to said George Elder, at Genoa, Douglas County, hay, barley and merchandise, and furnished board to said Elder for the agreed price of \$2,300 United States gold coin.”

The consideration of the other seven notes is stated in substantially the same manner.

To entitle a claimant against the estate of a bankrupt, to have his demand allowed, it must be verified by a deposition in writing, on oath or solemn affirmation before the proper Register or Commissioner, setting forth the demand,

1870.]

Opinion of the Court—Hillyer, J.

the consideration, and other matters not necessary to notice now; “and no claim shall be allowed, unless all the statements set forth in such deposition, shall appear to be true.” (Bank. Act, Sec. 22.)

This proof, if satisfactory to the Register, is to be delivered to the assignee, who shall examine the same, and compare it with the books and accounts of the bankrupt and register in a book, “the amount and nature of the debt.” (Ibid.)

Certainly, the consideration ought to be so stated, that the assignee upon comparing the claim and books, can determine whether the claim proved, and the books agree. And here it is proper to notice what appears to be a serious defect in the Bankrupt Act. In this case, at the creditor's election, Henry Vansickle was chosen assignee. Now, is it to be expected that, if there be any illegality or fraud in his claim, he would compare it with the bankrupt's books, or apply to the Court to have it rejected under Section 22, or that, if his claim should be rejected, he would, after appealing, plead and answer his own statement under Section 24? It is far more likely that he would make use of his own position to cover up the fraud or illegality, if any there was.

In order to secure perfect fairness and impartialty, the assignee should either be an officer of Court, or selected from among other persons than creditors of the estate.

But what was the object of the law maker in requiring the consideration to be stated in the deposition? The answer to this will help to ascertain how particular the statement of it must be. One object, no doubt, was to enable the Register to say whether it is legal in its nature, and will support a demand or promise. Another, to show him whether or not the demand is unliquidated, and must be ascertained by assessment before its allowance. Another, to afford the assignee means for comparing the books of the bankrupt with the proof. But the chief object, no doubt, was to put a check upon the proof of fraudulent and fictitious claims, by requiring the claimant to give such a par-

Opinion of the Court—Hillyer, J.[March,

ticular and definite statement of the consideration, as would enable other creditors to trace out, discover, and expose the fraud or illegality of the claim, if any existed.

The requirement is intended to be for the benefit of all other creditors of the estate and the bankrupt, and to prevent fraud.

If the statement of the consideration is so general and indefinite, as to afford no aid to the creditors in their inquiry as to the fairness and legality of the claim, it does not effect the object of the law, and must be held insufficient.

Touching the question now being considered, I can find no adjudications directly upon this part of the bankrupt law. I must, therefore, be guided by the evident purpose of the law, and such decisions in analogous cases as may throw light upon the question.

Upon a confession of judgment in California and New York a statement is required which must "state concisely the facts out of which the indebtedness arose, and shall show that the sum confessed therefor is justly due." (Pr. Act., Cal., Sec. 374; 3 R. S., New York.) Under this provision it is held that the failure to state the amounts due severally for goods and for money itself would be fatal. Such an averment would be insufficient in a complaint. (*Cordier v. Schloss*, 18 Cal. 576.) The mere statement that the debt is by note is insufficient. (Ibid; *Plummer v. Plummer*, 7 How. Pr. Rep. 62.) In *Plummer v. Plummer* (7 How. Pr. Rep. 446), the amount of the debt was stated, and then that it arose out of the following facts: "For goods, wares and merchandise sold and delivered to me by Messrs. Schoolcraft & Co., Albany, of which firm plaintiff is a member; the goods were purchased by me in the years 1851 and 1852." The Supreme Court of New York says of this statement:

"This is far short of a compliance with the statute. One important object was, that other persons than parties to the judgment might by reference to the statement, be informed of all the material facts relating to the indebtedness, and thus defeat fraud, if any.

"The statement is much too general; no essential bene-

1870.]

Opinion of the Court—Hillyer, J.

ficial purpose would be answered by such a statement, as to the nature, consideration and origin of the debt. The kind of goods, wares and merchandise, the quantities, the prices charged for them, the times or near the times in the years stated, when the purchases were made, ought to be shown."

The New York statute regulating confessions of judgment by warrant of attorney, required "a particular statement and specification of the nature and consideration of the debt or demand on which such judgment is confessed," and it was held that a specification so general as a common count, was not sufficient; that it ought to be as particular and precise as a bill of particulars. If for goods sold, the kind, quantity and price of goods, and the time of sale, as in a bill of parcels. (*Lawless v. Hackett*, 16 John. 149.)

The Court of Appeals held this language to be applicable to a statement under the first mentioned law. (*Chappel v. Chappel*, 2 Kirnan, 215.)

In this case, the confession or statement states that the debt arose out of a promissory note. This was held insufficient; the Court saying, "the statute looks not to evidence of the demand, but to the facts in which it originated; in other words, to the consideration which sustains the promise." To the same effect as the foregoing, numerous other cases might be cited. All of them treat the words "fact out of which the indebtedness arose," as equivalent to "consideration," as was done in the case last cited.

Regarding the object of these State laws as identical with that of section 22 of the Bankrupt law, these decisions are entitled to weight. Indeed, the purpose of the framers of the Bankrupt law to secure, in every proceeding under its provisions, the utmost honesty and good faith on the part of the bankrupt and creditors, is disclosed in almost every section. The deposition required of a claimant on proof of his debt, by section 22, is much more searching, and descends more into particulars, than the statement on confession of judgment before noticed. All the statements set forth in the deposition must appear to be true. That is, as I understand it, the facts must be stated with so much certainty, particularity and detail, as that upon its face, without

extrinsic proof, the deposition shall appear to the register to be true. The more the deposition goes into details of time, place, quantity and price, the more it will appear to be true, and the less likelihood there will be that a fraudulent or illegal claim will be presented, or if presented, allowed; for the deponent seeking to prove an illegal or fraudulent claim, will always take refuge in generalities, and will reconcile the oath with his conscience by some specious reason, knowing the difficulty of convicting him of falsehood when subjected to an examination. But if he must make oath as to time, place, quantity, quality, price, etc., he will not be likely to state anything but the truth, for every detail stated increases the probability of detection if it be untrue.

I have gone thus at length into this question because it is new in this Court, and because it is important now that a rule should be fixed which is correct and as certain as the nature of the case will admit, for the infinite variety of considerations which will support a promise renders it impracticable to state an inflexible rule, or anything more than the principle to be applied to all cases.

Looking then at the object of the law and the reasons for requiring a statement of the consideration in the deposition, I consider that a general statement that the consideration of a demand is goods, wares and merchandise, or hay, barley and board, is not sufficient; that the kind of goods, the quantity, the price, and near the date of sale, should be stated; that the quantity of hay, or barley, the price, and the time of delivery, if delivered at one time, or if delivered continuously through a period of time, that period, should be stated. If the proof falls short of this, the register ought not to consider it satisfactory, and should withhold his approval. He has the right, and it is his duty to permit and require the deposition to be amended, subject always to the provision of section 4, which requires all issues of law or fact raised and contested by any party to the proceedings, to be adjourned into Court for decision.

If the proof is not satisfactory to the Register, it should be made so before it is signed by the deponent or transmitted to the assignee.

1870.]

Opinion of the Court—Hillyer, J.

Where, as in this case, the proof has been passed as satisfactory by the Register, and the question of due proof or not, comes up before the Court, upon the application of creditors to have the claim rejected, if the evidence taken before the Court, shows the consideration to be legal and sufficient, the claim will not be rejected. Such, I consider, the fair construction of the last clause of Sec. 22. If defects in the deposition have justified the application, costs can be imposed upon the party in fault.

Tested by the above rule, neither the original nor amended deposition of Vansickle is sufficient. Whether the proof taken before the Court has shown the consideration of his claim to be fair and legal, will be determined in considering another branch of this case.

It is alleged by the creditors, that note No. 8 is illegal. This note was given by Elder, on the 29th day of October, the day before the petition of Elder was filed, as is said, for a balance of account due that date.

It appears from the books and other testimony, that from the 20th to the 29th of October, Elder was charged on the books of Vansickle, double the prices for hay, oats and barley, that other customers were, and that these charges were made on a currency basis. A charge appears on the blotter, dated October 29, to Elder for \$234.80 worth of feed, the whole of which is included in this note.

The testimony shows that this was the estimated amount of feed which would be used by Elder during the remainder of the month of October and had not at the time of the making of the note been delivered, and that a large portion of it (more than one half) never was furnished to Elder. The double price was charged in pursuance of an agreement made between Lynds (Vansickle's agent) and Elder. By reason of the double price charged, changing in currency and the including of the hay and grain not furnished, the amount of this note is more than doubled.

I think the testimony shows a large portion of the consideration of this note to be founded in illegality; and in accordance with a well settled principle of law, this illegality of a part of the consideration make the whole note void

●

and unavailable so far, at least, as the interests of creditors are concerned. (1st Parsons on Con., p. 380.)

Note numbered seven, given October 19, for the sum of \$855.57, is for a balance of account which amounted at that time, as shown by Vansickle's ledger, to \$641.68. The explanation given for this difference is, that the charges were made on the book at coin rates, and when the note was taken, one third was added to the account to make the note, payable in currency, the equivalent of \$641.68 in coin. This note also includes in its amount \$35.29 interest improperly and illegally charged in the account against Elder.

No direct proof was made of a specific agreement by Elder to pay coin, nor is there anything to establish such agreement beside the presumption arising out of the fact that business in this State is generally done on a coin basis. In the absence of a contract stipulating in terms for the payment of gold or silver, this book account was payable in currency.

To allow a debtor, on the eve of bankruptcy, to do what was done here, would lead to abuse, and enable a debtor by raising the demand of a creditor one third, to give such creditor a preference over others less favored. Suppose that another creditor had a claim on book account for \$641.68, and the bankrupt refuses to make any note or agreement to pay in coin, or to raise it to such basis. This creditor can prove only \$641.68, while the preferred one who gets the currency note, proves and receives dividends on \$855.57. The latter then receives a preference equal to the dividend on the difference, \$213.89.

I consider that Vansickle has illegally increased the amount of this portion of his claim, and it must be rejected for this illegality.

So far as the notes, numbered 3, 4, 5 and 6, are concerned, if there was nothing against their validity, except the fact that they had been changed into currency from coin notes, which expressly stipulated for payment in coin, I should hold them to be valid. The better and correct practice, where a party has a demand by its terms payable in coin, is to prove it according to its terms.

●

The demand should then be entered on the books of the assignee as payable in coin, and the claimant would be entitled to receive his dividend thereon in the stipulated currency. The correctness of this rule is established, in my judgment, by the decision of the Supreme Court of the United States, in the case of *Bronson v. Rodes*, 7 Wall, 229, where it is held that “an express contract to pay coin dollars can only be satisfied by the payment of coin dollars,” and that “when contracts made payable in coin are sued upon, judgment may be rendered for coined dollars and parts of dollars; when made payable in dollars, generally without specifying in what description of currency payment is to be made, judgment may be entered accordingly without such description.”

Note numbered two, for \$2,300, dated at Genoa, April 13, 1866, and note numbered one, for \$1,350, dated at Carson City, June 7, 1867, both bearing two per cent. interest per month, and payable in gold coin, the petitioners say are founded in fraud and illegality, and nothing else.

These notes, although purporting to have been made at different towns, and in different years, are both written on what was, it is admitted, once one piece of paper. The notes themselves, when examined, show this. All of the experts agree that the two pieces of paper on which they are written were once one; that they appear to have been written under the same conditions, at the same time, with the same pen, the same ink and by the same person. No satisfactory explanation was given of these circumstances.

The whole testimony compels me to the following conclusions of fact:

That the notes one and two are fraudulent and void as to the other creditors of the estate.

That these two notes were made for the purpose of fraudulently enlarging the claim of Vansickle against the estate.

That the transactions of October 19, and up to and including October 29, were done with a view to Elder's bankruptcy and for the purpose of giving Vansickle an undue advantage, under the Bankrupt Act, over the other creditors of Elder.

That before and since the filing of Elder's petition and since Vansickle has been acting as assignee, there has been an understanding between Vansickle and Elder, having for its object their mutual benefit at the expense of the other creditors of the estate.

It only remains to determine what effect the fraudulent and illegal portion of this claim has upon that part of it which is admitted to be just, if separated from the other.

From the language of sections 8, 22 and 24 of the Act, and Forms 66 and 68, it is evident that in a proper case, a claim may be allowed in part, or allowed or disallowed as a whole. What the action of the Court will be, must depend in each case upon the circumstances of that particular case.

The object of the bankrupt law is to enable the honest debtor to obtain, by a full surrender of his property, a discharge from his debts, and to distribute to the honest creditors, *pro rata*, the property of the debtor. The law is full of provisions to prevent, not only actual frauds, but any act which tends to defeat its object.

The thirty-ninth section provides that any creditor receiving any payment, gift, grant, sale, conveyance or transfer of money, or other property, estate, rights or credits from the bankrupt, he intending to give a preference, and such creditor at the time having reasonable cause to believe the debtor insolvent, shall not be allowed to prove his debt in bankruptcy.

Here a creditor is debarred from proving his debt, if he has accepted part payment, however just his claim, or however free he might be of any actually dishonest motive in accepting this preference.

Can this Court say that the creditor who deliberately commits a fraud upon the act, and the other creditors by other means, shall receive at his hands better treatment than this creditor who has accepted a preference from a debtor of a partial payment of a just debt?

The conduct of Vansickle is fully within the spirit and intention of the prohibition and penalty of this section, if not strictly within its letter, and a thing clearly within the intention is within the law though not within the letter.

1870.]

Opinion of the Court--Hillyer, J.

Every party to proceedings under the bankrupt law must be held to the utmost good faith; and he who attempts a fraud cannot, if discovered, complain, when made to abide by the legal consequences of his act.

If the strict rules of other Courts in adjusting the priorities of creditors are applied, this claim must fall as a whole. If a party having several just claims includes in his judgment one that is unjust, or one that is not yet due, or more interest than is due, his whole judgment, so far as it is a lien having priority over other creditors, will be postponed until the junior creditors are paid. (*Pierce v. Partridge*, 3 Met. 44.)

Where one had obtained a judgment and included in it the amount of one note known to be fraudulent, it was argued that the judgment ought to stand for so much as was just, but the Court said: The argument amounts to this—that a man having a just claim to a small sum, who should fraudulently bring forward claims to a much larger amount not due, and who should be detected, should be placed in as good condition, at least, as if he had not mixed the good and bad together. We think the law is directly the reverse, and that the fraud corrupts and destroys the whole. (*Fairfield v. Baldwin*, 12 Pick, 388.) This language is cited with approval by the Supreme Court of California, in a case where a party had taken judgment on five notes, one of which was not due. (*Taaffe v. Johnson*, 7 Cal. 352.) To permit Vansickle to now separate the good portion of his claim from the bad, and thus be put in as good condition as if he had attempted no wrong, would be contrary to well settled principles of law and to the plain requirements of the Bankrupt Act.

The order of the Court, which the Clerk will enter, is as follows:

Upon the evidence submitted to the Court upon the claim of Henry Vansickle against said estate of Geo. Elder, and upon hearing counsel thereon, it is ordered that said claim be disallowed and expunged from the list of claims upon the assignees' record in said cause.

It is further ordered that the said Henry Vansickle do pay the costs of this proceeding.

THE UNITED STATES *v.* A CERTAIN PIECE OF LAND,
ETC., *V.* SPRECKENS, *Claimant.*

DISTRICT COURT, DISTRICT OF CALIFORNIA.

MARCH 31, 1870.

1. ACT OF JULY TWENTIETH, 1868, SECTIONS 6, 7, 8 AND 44, CONSTRUED.—

The lot or tract of land (as intended in Sections 6, 7, 8 and 44 of the Act of 1868), of which a description is to be given, or which is required to be unencumbered, or for the value of which a bond is to be given, and which it is forbidden to encumber, and which under Section 44 may be forfeited, is, as declared in Section 7, the real estate and premises connected with the distillery, that is used in connection therewith to facilitate the carrying on of the business and conducive to that end, and does not include such pastures, orchards and vineyards as are in no other way connected with such distillery than that they are contiguous and under the same ownership.

Before HOFFMAN, District Judge.

F. M. Pixley, Esq., Attorney for the United States.

J. J. Williams, Esq., Attorney for Claimant.

HOFFMAN, J. This action is brought to enforce a forfeiture under the forty-fourth section of the Act of 1868. The section provides, in substance, that any person who shall carry on the business of a distiller, etc., without having paid the special tax, or without having given bonds as required by law, shall forfeit all the right, title and interest of such person in the spirits, wines, stills, apparatus, etc., owned by such person, and the personal property found in the distillery or rectifying establishment, or in the store or other place of business of the compounder, or any building, room, yard, or enclosure connected therewith and used with or constituting part of the premises, and all the right and interest therein of such person in the lot or tract of land on which such distillery is situated.

At the trial, the violation of the law was clearly proved, and the only question that arises is as to the extent of the forfeiture under the last cited clause of the act.

It appears that the claimant is the owner of a tract of

1870.]

Opinion of the Court—Hoffman, J.

land or farm one hundred and thirty acres in extent. It is variously cultivated, and consists of fruit orchards, vineyards of several varieties of grapes, a pasture lot, barley field, and a mountainous and wooded tract not under cultivation.

It is claimed on the part of the United States that the whole of this farm is forfeited as constituting the "lot or tract on which the distillery is situated." It is apparent that if the statute is to be so construed in this case, it must receive the same construction in all cases, notwithstanding that the tract of land may be a rancho many square leagues in extent. The statute would thus be construed to impose a forfeiture of all the real estate owned by the offender, of which the site of the distillery formed a part.

The operation of such a law would not only be harsh but unequal—for it would make the amount of the forfeiture depend, not on the value of the distillery establishment and the presumed magnitude of its operations, but upon the accidental circumstance that the illicit distiller happened to own a large tract, on the corner of which a still, perhaps of insignificant proportions, was erected.

In section 7, the forfeiture for failing or refusing to give bond is, "of the distillery, etc., and all real estate and premises connected therewith." There would seem to be in this section an intention to limit the forfeiture to such real estate and premises as were used in connection with, or as auxiliary to, the illicit business.

The statute not only punishes the offender personally, but it regards the instruments and apparatus he has used in the commission of the offense, or which are conducive to the carrying on of the business, as tainted with the crime, and confiscated. But real estate, pasture, orchard, or wood lots, the homestead of the family, etc., which have no connection with the unlawful business, which were not used in it, or contributed in any degree to facilitate its prosecution, are not by the 7th section declared to be forfeited.

The 8th section provides that no bond of a distiller shall be approved unless he is the owner in fee of the lot or tract of land on which the distillery is situated, or unless he shall

Opinion of the Court—Hoffman, J.

[March,

file the written consent of the owner, mortgagee, judgment creditor, etc., that the lien of the United States for taxes and penalties shall have priority, etc.

In case the distillery is on leased premises, a bond may be substituted, of which the penal sum is to be the appraised value of said "lot or tract of land," together with the buildings, distilling apparatus, etc.

If, under this section, the owner of a rancho several square leagues in extent, should offer his bond for approval, would the assessor be required to eject it, if it should appear that a tract of a few hundred acres, perhaps five or ten miles distant from the distillery, was under mortgage? Or if a leaseholder were to make a similar application, should he be required to give a bond of which the penal sum must be the appraised value of the entire rancho?

The same question is presented under section 6. By that section the distiller is required to give "a particular description of the lot or tract of land on which the distillery is situated." Is he, under this section, to give the boundaries of his whole rancho, and to include all the real estate owned by him not separated by intervening property from the spot on which the distillery is erected? By the 7th section, the distiller is required to give bond that he will not suffer the "lot or tract of land on which the distillery stands, or any part thereof, to be encumbered by mortgage, judgment or other lien." Is this to be construed as prohibiting him from mortgaging, or perhaps even selling any part of the farm or rancho within the exterior boundaries in which the distillery is situated?

It seems to me that to these questions but one answer can be given. The lot, or tract of land of which a description is to be given, or which is required to be unencumbered, or for the value of which a bond is to be given, and which it is forbidden to encumber, and which under section 44 may be forfeited, is, as declared in section 7, the real estate and premises connected with the distillery; that is, used in connection therewith, to facilitate the carrying on of the business, and directly or indirectly conductive or contributory to that end. It will include all buildings, yards, enclosures,

1870.]

Opinion of the Court—Hoffman, J.

offices, stables, wine-cellars, etc., used in the illicit business. But it ought not to include dwelling-houses, pasture or sowing lots, etc., or village lots and houses, which, though owned by the offender, are not in any way employed in his business as a distiller, which may be occupied or rented by other persons, and which, so far as the illicit manufacture is concerned, might as well have belonged to any one else.

The language of the statute is “lot or tract” of land. The latter word may have been used as synonymous with the former and to indicate a village or town lot which, being of definite boundaries and usually of limited size, might not unreasonably be deemed to be used and occupied for the purposes of the illicit business. An adjoining lot, though owned by the offender, would not under this provision be forfeited. It would be strange if the circumstance that the distillery was situated on an extensive farm in the country, should involve in the forfeiture, pasture, grain and wood lots, orchards, vineyards, dwelling-houses, and even it might be village lots, remote from the scene of operations of the distillery and having no connection with it.

In the plat of the survey of the farm sought to be forfeited in this case, there is laid down a tract of land a few acres in extent, adjacent to the distillery, and including that building, the wine-shed, tank, etc. It is separated by a road from a vineyard of table grapes, which lies on the west; on the north, by a road running near or along a brook, from a barley field; on the east, by a fence, from a pasture lot; and on the south it is bounded by the exterior boundaries of the farm. It seems to me that to this tract the forfeiture should be limited. A judgment to this effect will be entered.

Opinion of the Court—Hillyer, J.[April,

In re E. MALLORY.

DISTRICT COURT, DISTRICT OF NEVADA.

APRIL 10, 1871.

1. DISTRICT COURT IN BANKRUPT PROCEEDINGS MAY RESTRAIN EXECUTION OF PROCESS OF STATE COURT.—The District Courts of the United States, sitting in bankruptcy, have power to restrain, by injunction, the Sheriff of a State Court from proceeding to sell the property of a voluntary bankrupt, under an execution issued out of a State Court upon a judgment obtained before the commencement of proceedings in bankruptcy.
2. JUDGMENT LIEN, WHEN DECLARED VOID.—It has also the power to declare the lien of a judgment of a State Court void, as against the general creditors, if such lien is an unlawful preference under the Bankrupt Act.
3. JUDGMENT LIEN LIQUIDATED IN BANKRUPTCY.—The lien of a judgment, like other liens, is to be ascertained and liquidated in the Bankruptcy Court.
4. Section 1 of the Bankrupt Act of 1867 construed.

Before HILLYER, District Judge.

Motion to dissolve injunction restraining the Sheriff from selling property of the bankrupt, under judgment obtained in the State Court, before the institution of proceedings in bankruptcy.

R. M. Clarke, for the motion.

R. S. Mesick, for Respondent.

HILLYER, J. On the twenty-third day of October, A. D., 1869, Henry Vansickle obtained a judgment, by confession, against the bankrupt, in the State District Court for the county of Douglas. Execution was issued thereon, levied on certain property of the bankrupt, and the Sheriff of Douglas County had advertised the property for sale, when, on the fifth day of February, A. D., 1870, Mallory was adjudged a bankrupt in this Court, on his own petition. On the same day the bankrupt petitioned this Court for an injunction restraining the said Sheriff from selling the property levied on, which was granted.

Vansickle now files a petition praying that the injunction may be dissolved. Mallory's assignee answers, alleging that the judgment is not a valid lien, was procured in fraud of

• 1871.]

Opinion of the Court—Hillyer, J.

the Bankrupt Act, and prays that the same be declared to be no lien upon the property, and that the property be ordered to be sold by the assignee free from any lien of the said judgment. As a matter of practice, it may be stated that it was unnecessary to file a petition in this case. A motion to dissolve the injunction would have been the correct way of proceeding.

The main question argued was as to the power of this Court, sitting in bankruptcy, to enjoin the Sheriff of a State Court or parties litigant therein, from proceeding to sell property levied upon by virtue of a writ of execution issued out of the State Court, upon a judgment obtained therein before the proceedings in bankruptcy were commenced, with the understanding that the injunction should remain in force if the Court should be of opinion that such power existed, leaving the question as to the validity of the lien of the judgment to be determined hereafter, in some other proceeding.

The question is one of the utmost importance, involving the propriety of the exercise of a power by a Federal Court, the effect of which is to restrain proceedings in a State Court, and I feel that its decision imposes upon this Court a great responsibility.

In September last, this same question was brought before me in the case of the Lady Bryan Mining Company, and a motion to dissolve the injunction was denied; but as in that case there was no question raised as to the validity of the judgment liens, and the lien of the judgment creditors was transferred to the proceeds of the property, the point was not so fully argued as it has been now, and I was in this case not only willing, but desirous of hearing further argument from the learned counsel who represent the present parties.

Upon this argument, the sections of the Bankrupt Act relating in any way to this question, have been read and commented on by counsel, for the purpose of ascertaining the policy and object of the act, and the extent of the power conferred to carry out the policy and effect the object; a great mass of authorities was cited and read on the hearing, and the whole, together with a careful examination on

Opinion of the Court—Hillyer, J.

[April, .

- my part of the entire subject, has resulted in more firmly confirming me in the correctness of the opinion expressed in the Lady Bryan case.

Congress, in the enactment of laws upon the subject of bankruptcies, has complete and plenary power, unrestricted save as to uniformity. It has, in legislating upon this subject, power to take from State Courts the administration of remedies for the enforcement of liens. The passage by it of a bankrupt law *ipso facto* abrogates all State insolvent laws. The bankrupt law is then the supreme law of the land, binding alike upon Federal and State tribunals, and wherever by express words or by necessary implication it affects State laws, the power of State Courts or the remedies of suitors therein, it is paramount.

The jurisdiction of the Courts of the United States in matters of bankruptcy is derived from, and its extent must be determined by reference to the language of the Bankrupt Act; and before those Courts restrain parties litigant in, or officers of State Courts from prosecuting their remedies therein, or executing the process of those Courts, the power to do so ought to be found either in the express language of the Act, or it must result as a necessary means for effecting the powers expressly conferred.

Section 1 of the Bankrupt Act, constitutes the several District Courts of the United States Courts of Bankruptcy, and gives them original jurisdiction in all matters and proceedings in bankruptcy. This jurisdiction is declared to extend: To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; to the marshaling and disposition of the different funds and assets; and to all acts, matters, and things to be done under, and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

1871.]

Opinion of the Court--Hillyer, J.

As reference will be made to the Bankrupt Act of 1841, I quote that portion of it conferring jurisdiction. It is declared to "extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors, and the assignee of the estate, whether in office or removed; to all cases and controversies between such assignee and the bankrupt, and to all acts, matters and things to be done under, and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of proceedings in bankruptcy." (5 Statutes at Large, p. 415, Sec. 6.) Under this section of the Act of 1841, there was much diversity of opinion among Courts and lawyers, as to the existence of power to control by injunction upon the parties, the proceedings in State Courts. The changes made by the Act of 1867, are very noticeable and important. The present law, unlike that of 1841, extends the jurisdiction in plain terms, to the collection of all the assets of the bankrupt, the ascertainment and liquidation of liens and other specific claims upon those assets, and to the adjustment of priorities and marshaling of assets so as to secure the rights of all parties, and this jurisdiction is original and exclusive. Now, when Congress delegated to the District Courts, this equitable jurisdiction in bankruptcy, it must follow, by necessary implication, that it also delegated at the same time the power to administer such remedies known to the law as were absolutely indispensable to the complete exercise of the jurisdiction expressly conferred. One power directly given, is the collection of all the assets. The means by which this result is to be reached are not enumerated, but power to accomplish the result is given, and the right to employ the proper legal process for effecting the result must follow by necessary implication.

The property levied on in this case is part of the assets of the bankrupt. It may be subject to a lien, but the legal title to the property was in the bankrupt when the petition was filed and passed to the assignee. The judgment of

Opinion of the Court—Hillyer, J.[April,

Vansickle, if a valid lien by the laws of this State, and not impeachable under the bankrupt law, as a fraud against it, is to be respected and protected by the Bankruptcy Court. But this statutory lien is neither a right in or to the thing, but is simply a charge thereon.

How now, I ask, could the assets in this case have been collected by the assignee without restraining the Sheriff from selling them under his execution? It certainly would complicate the case exceedingly, if the Sheriff, after the legal title, by virtue of the bankruptcy, had passed out of Mallory to the assignee, had sold the property as the property of Mallory.

Closely connected with this power of collecting the assets, is that of ascertaining and liquidating the liens, which may be claimed to exist upon those assets.

If the validity of any lien upon the assets of the bankrupt is denied or questioned, in what Court is the question to be tried, the validity or invalidity of the lien ascertained, and, if found valid, liquidated? The answer is, that by the express terms of the act, this jurisdiction is given to the Bankruptcy Court.

Here, as in collecting the assets, a specific result is to be attained, and can it be doubted that the means by which it is to be attained are also given.

The lien is to be ascertained and liquidated in the Bankruptcy Court, and this would be an idle proceeding if that Court has not power to preserve the property, by restraining its sale until the lien is ascertained to be good, or to be void, and of what use is it to say that this Court shall liquidate liens, if it cannot restrain parties from liquidating their liens without its intervention. The bankrupt law is highly remedial, and it ought to have a liberal construction, for the purpose of effecting its aim and policy. The expediency and policy of bringing all the assets into the Bankruptcy Court, and ascertaining and liquidating there all liens and specific claims thereon, is undeniable.

And while neither the expediency of exercising this power nor the inconvenience of not exercising it, can justify its employment if not found in the statute in direct or neces-

1871.]

Opinion of the Court—Hillyer, J.

sarily implied terms, these considerations may be, and ought to be looked at in construing the law and arriving at the intention of the law-makers. Let us suppose that two persons each have, or claim to have, a lien by judgment in the State Courts, upon the property of the bankrupt at the time of bankruptcy, and that there is a dispute between them as to the priority of their liens or the validity of one of the judgments. One creditor comes into the Bankruptcy Court, proves his claim and asks to have his lien liquidated. The other proceeds in the State Court. If neither Court can restrain or control parties before the other, here will be a direct conflict of jurisdiction; decisions as to priorities or validity of the liens may be conflicting, and each Court proceeding to take possession of the property through its process and officers, and satisfy the lien of the party before it. Such a state of things would be very much to be deprecated if the bankrupt law were so lame and impotent as to have left the case unprovided for. But the law is not, I conceive, so defective. It gives the Bankruptcy Court an original and exclusive jurisdiction over all the parties to the bankruptcy proceedings, all the assets and all the liens thereon. Again, a lien may be good by the law of the State and void under the bankrupt law; thus, a lien by attachment is avoided, and the State law creating it is so far abrogated, if the attachment was made within four months next preceding the commencement of proceedings in bankruptcy; so a judgment lien may be void under the bankrupt law, as an unlawful preference to the judgment creditor. Hence, while the judgment might stand in the State Court, the lien of that judgment might be avoided in the Bankruptcy Court; and so it was held under the law of 1841, and that the creditor was liable to refund to the assignee the proceeds of a sale made under the judgment; such creditor having notice of the proceedings in bankruptcy. (*Shawhan v. Wherritt*, 7 Howard, 626.)

Let us see now how this question stands upon authority. Where judgment had been obtained in a State Court, execution issued and returned unsatisfied, and an order made on proceedings supplementary to execution for the examination

Opinion of the Court—Hillyer, J.

[April,

of the judgment debtor, Judge Blatchford ordered a stay of all proceedings on the said order until the question of the discharge of the bankrupt should be determined by the Bankruptcy Court. (*In re Horatio Reed*, Sup. B. R. 1.)

In an involuntary proceeding before the same Judge, he, under the 40th section of the Bankrupt Act, enjoined the Sheriff of a State Court from proceeding to sell property of the alleged bankrupt, and on motion refused to dissolve it until the question whether or not the debtor was to be adjudged a bankrupt was decided. (*In re Devlin & Hagan*, Sup. B. R. 8.) The 40th section of the Act gives the District Court power by injunction to “restrain the debtor and any other person” from making any transfer or disposition of any part of the debtor’s property until the return of the order to show cause why the debtor should not be adjudged a bankrupt. On the hearing it was argued that the express grant of power to enjoin in proceedings *in invitum* was a denial of any such power in voluntary proceedings upon the maxim *expressio unius est exclusio alterius*. But it is to be observed that under section 14 it is “in virtue of the adjudication of bankruptcy and the appointment of an assignee” that the property vests in the assignee.

Now, in voluntary cases, the filing of the petition is an act of bankruptcy, and the debtor at the same time surrenders all his estate and effects for the benefit of his creditors and is forthwith adjudged a bankrupt. The District Court is thus clothed at once in voluntary cases with jurisdiction over the debtor and his property. But where the proceeding is involuntary the debtor is not adjudged a bankrupt until the return and hearing of the order to show cause, and may not be then if he have a sufficient defense.

There is, therefore, good reason for giving the Court power to enjoin between the time of filing the creditor’s petition and the return of the order to show cause, as there is in these cases no voluntary surrender of the property and the title cannot vest in the assignee until after adjudication. If the argument of the petitioner is sound the Court would have power to enjoin in involuntary cases before adjudication, but must dissolve it immediately after, because the

1871.]

Opinion of the Court—Hillyer, J.

statute in express terms only provides for an injunction until the return of the order to show cause. So that the Court might enjoin before it was certain the property of the bankrupt would ever come into its possession, and might not after the property was fully within its jurisdiction.

A bankrupt held under arrest by the Sheriff of the city and county of New York, under orders of arrest from the State Court, was discharged from arrest and proceedings on actions against the bankrupt in the Supreme Court of the State were stayed. (*In re Henry Jacoby*, Sup. B. R. 26.)

In a case before Judge Benedict (E. D. New York,) where judgment was obtained, execution issued and levied on property of the bankrupt prior to the commencement of proceedings in bankruptcy, that Judge enjoined the creditors from enforcing the levy. On motion to dissolve, which was denied, although this question of power was not discussed, the Judge said that the power seemed to be fairly included in the power to collect all the assets, to ascertain and liquidate liens and to adjust priorities. (*In re Francis Schnepf*, Sup. R. 41.)

In a voluntary proceeding upon a bill filed to enjoin a Sheriff from selling property of the bankrupt under an execution from a State Court, Judge Hill, of the Mississippi district, held that the bankrupt himself had a right to file the bill before an assignee was appointed; that if the Sheriff had actually levied before the bankruptcy, he would be allowed to proceed without a showing that the sale would be injurious to the general creditors or to some one having a prior lien; that the 20th section, in connection with the 1st and 25th, gave the Court jurisdiction of the subject matter; that the commencement of proceedings in bankruptcy transferred to the District Court jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith, and operated as a supersedeas of the process in the hands of the Sheriff and an injunction against all other proceedings than such as might thereupon be had by authority of the Bankruptcy Court. (*Jones v. Leach*, 1 B. R. 165.) A Sheriff was restrained from selling goods under execution by the same judge, in *Pennington v. Sale* (1. B. R. 157).

Opinion of the Court—Hillyer, J.[April,

After judgment in a State Court, execution, levy and advertisement for sale, the Sheriff was restrained. (*In re Henry Bernstein*, Sup. B. R. 43.) The jurisdiction of a District Court of the United States is superior and exclusive in all matters arising under the statute, and extends to a suspension of proceedings taken for the purpose of subjecting portions of the estate surrendered to a sale under State process. Until a sale is made the bankrupt is not divested of his interest in the property under seizure. (*In re Barron*, 1 B. R. 125, District of Louisiana.) A preliminary injunction was issued restraining the plaintiff in an execution upon a judgment confessed in a State Court, and he moved to dissolve it. The question was argued before two judges, Grier and Cadwalader, and the jurisdiction maintained, the Court refusing to dissolve the injunction. (*Irving v. Hughes*, 2 B. R. 20.) Where judgments were rendered after the bankruptcy, Judge Deady held the jurisdiction to restrain the enforcement of the judgments was undoubted. (*In re Wallace*, 2 B. R. 54.) Parties proceeding, after the bankruptcy, to foreclose a mortgage on the property of the bankrupt, in the State Court, were enjoined. (*In re Kerosene Oil Co.*, 24 B. R. 164.) A landlord was enjoined from distraining the bankrupt's property for rent. (*Brock v. Tirrell*, 2 B. R. 190.) In a case where the bankrupt himself filed a petition to restrain certain persons, who had obtained judgments against him prior to the filing of his petition, from proceeding by execution, Judge Giles, of the Maryland district, in answer to an objection that the District Court had no jurisdiction, but that the proceeding must be by bill and in the Circuit Court, said: "I am clearly of the opinion that the petition was properly filed in this Court, and that this Court has, by virtue of the 1st section of the Bankrupt Act, full and adequate jurisdiction over all matters relating to the settlement of the bankrupt's estate, either at law or in equity, by way of petition or bill; and that whenever the relief sought is necessary to the protection of the general creditors, such relief will be granted;" but as in the case before him there was no suggestion of fraud, and the judgments were admitted to be valid liens, he held that the jurisdiction

1871.]

Opinion of the Court - Hillyer, J.

of the Bankruptcy Courts was not exclusive, and permitted the judgment creditors to proceed in the State Court. (*Matter of Bowie*, 1 B. R. 185.) Upon the application of parties interested, the District Court has jurisdiction to ascertain and liquidate a judgment lien, and while so doing to enjoin the judgment creditor from enforcing the same by execution out of the State Court. (*Re Fuller*, 4 B. R. 29.) If creditors who assert a claim against the bankrupt are not barred by the discharge, are allowed to commence suit in the State Court for the purpose of saving the statute of limitations or securing testimony, the suit, after this object is attained, can be stayed to await the decision of the question of the debtor's discharge. (*Matter of Ghirardelli*, 4 B. R. 42.) After the bankruptcy, creditors of the bankrupt, having a lien by mortgage, were proceeding to foreclose in a Territorial Court. The Supreme Court held, that all the property, choses in action, effects, interests and equities of the bankrupt must be brought into the bankruptcy Court for settlement and distribution, and enjoined the creditors from proceeding in the foreclosure suit. (*Re Snedaker*, 3 B. R. 155.) Judgment was obtained in the State Court, execution levied and property advertised for sale before the filing of the petition in bankruptcy. The Sheriff was restrained from proceeding with the sale. (*Beattie v. Gardner*, 4 B. R. 107.) Under the law of 1841 an injunction was ordered against the assignee, appointed under the State laws, to stop his interference with the property of the bankrupt, and also to prevent certain creditors from proceeding with an execution. (*Ex parte Lucius Eames*, 2 Story, C. C. R. 322.)

For an instructive statement of the nature and extent of the equitable jurisdiction of Courts of Bankruptcy see *Ex parte Foster*, 2 Story, C. C. R. 131.

In the matter of *Hugh Campbell* (Sup. B. R. 36), after property had been sold and the proceeds were in the hands of the Sheriff, an injunction to restrain the State Courts and their officers from proceeding, for the purpose of bringing the proceeds of the sale into the Bankruptcy Courts for distribution, was refused. Judge McCandless based his refusal upon the ground that the Courts of the United States have

Opinion of the Court—Mr. Justice Field.

[April,

no power to enjoin proceedings in the State Courts, either directly or by restraining the officers of such Courts, or parties litigant therein.

This is the only opinion, so far as I can discover, directly denying this jurisdiction.

Upon my own convictions as to the proper construction of the Bankrupt Act, and upon the weight of authority, I hold that the Court had jurisdiction to issue the writ. The prayer of the petition is therefore denied with costs.

ON PETITION FOR REVIEW.

The decision of the District Court in this case was affirmed by the Circuit Court, on petition for review in the following opinion:

Mr. Justice FIELD. When counsel closed their argument on the petition of Vansickle, for a review of the order of the District Judge, I had no doubt of the correctness of that order, but I thought the case was one of sufficient importance to justify a written opinion, giving at length the views of the Court upon the questions raised. I, therefore, took the papers and reserved my decision. Since then, I have read with care the opinion delivered by the District Judge, when the matter was before him on the application of the petitioner to dissolve the injunction, and I find that it covers every question in the case, and presents the law in a very clear and satisfactory manner. It renders any opinion from me entirely unnecessary. I could not add to it nor improve it. I concur both in its reasoning and conclusion.

Petition denied.

April, 1870.]

Syllabus.

GLERVINA O. HOLMES v. THOS. J. HOLMES, JR. *et al.*

CIRCUIT COURT, DISTRICT OF OREGON.

APRIL 12, 1870.

1. **INADEQUACY OF PRICE—EFFECT ON SALE.**—Mere inadequacy of price is not sufficient to set aside a sale, but when such inadequacy is so great that the mind revolts at it, the Court will lay hold of the slightest additional circumstance of advantage or oppression to rescind the contract.
2. **MARRIAGE AT COMMON LAW.**—*Semble*, that at common law, or in the absence of any statute prescribing the mode of contracting marriage, a contract to marry *per verba de futuro cum copula*, does not amount to a marriage in fact.
3. **MARRIAGE: WHAT CONSTITUTES IT ACCORDING TO LAWS OF OREGON AND CALIFORNIA.**—The laws of California (Hit. Dig. 4, 466) and of Oregon (Or. Code, 783, 785) require that the consent of the parties to become husband and wife, must be declared in the presence of a person authorized by such laws to solemnize marriage, and two witnesses, and without the observance of these formalities the marriage relation cannot be created or entered into, in either of such States.
4. **MARRIAGES, WHEN VOID.**—Where citizens of a State purposely go beyond its jurisdiction and not within the jurisdiction of another State—as *at sea*—and then contract marriage otherwise than in accordance with the laws of such State, the transaction is a fraudulent evasion of the laws to which the parties owe obedience, and, therefore, void.
5. **COHABITATION NOT MARRIAGE—EVIDENCE OF PREVIOUS MARRIAGE.**—Living together as man and wife, although evidence of a previous marriage cannot make parties man and wife, nor can any length of cohabitation, however exclusive, ever constitute the relation of marriage.
6. **MARRIAGE, CONSENT NECESSARY TO.**—Marriage, although arising out of contract or the consent of the parties, is a relation, as much so as that of parent and child, and such consent must be mutual and absolute *per verba de præsente*, not merely to live together exclusively, but to become joined to one another in the estate of matrimony.
7. **COHABITATION NOT SUFFICIENT EVIDENCE OF MARRIAGE TO FOUND CLAIM FOR DOWER THEREON.**—On a bill to enforce a claim to dower, cohabitation of complainant and deceased and other circumstances, examined and held not sufficient evidence of a previous marriage between them.
8. **MARRIAGE WITH THE CIRCUMSTANCES SHOULD BE ALLEGED IN PLEADINGS.**—Where a woman claims to have been the wife of another, it is an insuperable objection to such claim, that the pleadings do not contain an allegation of a marriage to such other, with the circumstances of time and place, and that she withholds her testimony as a witness upon the same point.

Before DEADY, District Judge.

W. F. Trimble, David Logan and Erasmus D. Shattuck,
for Complainant.

Walter W. Thayer, W. W. Page and William Strong,
for Defendants.

DEADY, J. This is a suit in equity, brought by the complainant, styling herself Glervina O. Holmes, against Thomas J. Holmes, Jr., his brother Byron, his three married sisters—Mary A. Goodenough, Alice J. Strowbridge and Theresa Coulson, and their husbands, to cancel and set aside a certain deed executed by complainant to defendants, and for assignment of dower in the lands affected by the deed.

The bill was filed January 26, 1869; and alleges:

I. That the complainant is a resident and citizen of the State of California, and that the defendants, except Theresa and her husband, are citizens of the State of Oregon.

II. That Thomas J. Holmes, late of Portland, Oregon, died intestate on June 18, 1867, leaving as his children and heirs at law said Thomas J. Holmes, Jr., and his brother and sisters aforesaid; that “complainant was the lawful wife of the deceased and lived and cohabited with him as his wife from the — day of December, 1865, to the time of his death;” “that during the said marriage” and at the time of his death, the deceased was seized in fee and possessed of certain blocks and lots of land in the city of Portland of the value of \$100,000, the annual rents and profits of which are worth \$10,000; that it was not necessary to sell any of said real property to pay his debts, but that the same was inherited by his heirs, who have since partitioned it among themselves; that “complainant is the widow of said Holmes, deceased,” and by the laws of Oregon was and is entitled to dower in said real property; that the present value of such dower is not less than \$25,000; that complainant has never been barred of her dower in said property, and that the same has never been assigned to her, but her right thereto is disputed by said heirs.

III. That said heirs pretend to have purchased and obtained a release of complainant’s right of dower, by virtue of a certain deed signed by complainant, July 31, 1867, and

1870.]

Opinion of the Court—Deady, J.

by which complainant, styling herself Glervina O. Holmes, conveys to the heirs of Holmes, deceased, “all her right, title, interest, claim or demand, either in law or equity, as the widow of the said Thomas J. Holmes, or otherwise,” in and to the estate of said Holmes, in consideration of the sum of \$1,000, “and the further consideration that it was in his lifetime our wish and agreement before and in contemplation of marriage, that upon his, the said Thomas J. Holmes, death, all his property, both real and personal, should descend to his children, the heirs aforementioned, clear of and unencumbered with any claim of dower or any legal claim of myself in any manner whatever;” that said deed “was procured by said heirs to be executed by complainant through fraud, duress and under influence exerted over her by said heirs, and especially by said Thomas J. Holmes, Jr., and J. M. Stowbridge,” the husband of Alice J., aforesaid; and that the consideration of said deed “was grossly inadequate and the recitals therein contained false,” and the same was imprudently executed, the complainant being ignorant of the value of her interest in the estate, and unadvised of the nature and effect of said deed.

IV. The bill then sets forth the circumstances and condition of the complainant, at and before the signing of the deed, at great length and with much minuteness, to the effect that the complainant, after the death of Holmes, continued to live in the home house, but that said heirs came there also and took possession; that said heirs then conspired with said J. M. Stowbridge to harass complainant and drive her away from said home and cheat her out of her interest “in the estate of her said husband;” that complainant was then poor and friendless, without means of support and “in great distress, mental and pecuniary,” and without knowledge as to the value of the estate; that she did not sign said instrument freely, but through fear of said Stowbridge and Holmes, Jr., who, “in order to induce her to release her interest in said estate, falsely accused her of criminal intercourse with said Holmes, deceased, prior to his marriage with complainant and before the death of a former wife of said deceased, and represented to com-

plainant that she was liable to a criminal prosecution, and unless she would give up her claim to said estate and leave the house and move out of the State, they would cause her to be prosecuted in the Courts and held up to public scandal, infamy and disgrace, and to be punished by imprisonment; and that said Strowbridge and Holmes, Jr., made it a condition of said payment of \$1,000, that the complainant should leave the State, and to that end said sum was made payable, \$500 in Portland and the remainder in ten months after sight at Wells, Fargo & Co.'s in San Francisco.

On April 1, 1869, an answer to the bill was filed, purporting to be the answer of all the defendants except Mary A. Goodenough and her husband, but such pleading was not signed or sworn to by any of the defendants except Thomas J. Holmes, Jr. To this answer the plaintiff, on May 1, filed exceptions for scandal and impertinence and insufficiency; which were afterwards heard and allowed by the Court.

On August 21, the joint and several answer of all the defendants to the bill was filed, and on September 6 the complainant filed the general replication thereto.

By the amended answer, the defendants admit the allegations of the bill concerning the citizenship of the parties, the death of Holmes, the nature and value of the property of which he died seized, and its subsequent partition among the defendants, his heirs.

They deny that the complainant was ever the lawful wife of the deceased, or that he ever cohabited with her as his wife, or that he ever was married to her, or "that any relation created by marriage ever existed between them."

They admit the execution of the deed by the complainant to the heirs of the deceased for the consideration mentioned in the bill, but deny that the same was executed by her otherwise than of her own free will and accord.

They aver that for a long time prior to the death of the deceased the said Thomas J. Holmes and complainant "had been lewdly and lasciviously cohabiting together," and that upon the death of said Holmes complainant freely admitted to said heirs that she had never been married to deceased, and acknowledged that she had no claim on his estate. That

1870.]

Opinion of the Court—Deady, J.

she was only anxious to obtain sufficient means to go to her father, in Ohio, and leave the State quietly, without exciting comment upon her conduct in having lived illicitly with the deceased, and not desiring to be turned away penniless as a cast-off wanton, and that said heirs being also anxious to prevent the relation which had existed between their father and the complainant from becoming more notorious than possible, and to remove any cloud that might exist upon said estate by reason of said relation, it was mutually agreed between the parties, that the said heirs should pay said complainant the sum of \$1,000, and that complainant should execute to said heirs the deed in question; and that in pursuance of such arrangement complainant executed such deed and not otherwise, and that the recitals therein contained were inserted at her special instance and request.

On January 6 and 7 the Court heard the evidence of the parties, and on January 11, the cause was argued and submitted.

Two principal questions arise in the case:

1. Were the complainant and the deceased married to one another; and,

2. Was the deed from the complainant to the heirs wrongfully obtained from her.

Assuming that complainant was the widow of Thomas J. Holmes, she was entitled to an interest in his property worth at the date of the deed \$25,000. The mere money consideration of the deed—the sum of \$1,000—is such a grossly inadequate price for property of that value, as to shock the conscience and confound the judgment of a man of common sense. The unprejudiced mind revolts at it, and can only conclude that some advantage must have been taken of the complainant's ignorance or necessities. But then again, the particular charges in the bill of oppression and conspiracy by the heirs and Strowbridge to defraud the complainant in this matter, are fully denied by the answer and altogether unsupported by the proof. There is no direct proof that complainant was well advised of the value of the property affected by the deed, but at the same time there is every reason to believe, from all the circumstances, that she must

Opinion of the Court—Deady, J.

[April,

have known that it was worth many times what she was receiving for it.

Under what circumstances inadequacy of price will be sufficient to set aside a sale is well stated in two cases cited by counsel for complainant. In *Hough v. Hunt*, (2 Ohio, 502) the Court says: "The rule in chancery is well established. When a person is encumbered with debts, and that fact is known to a person with whom he contracts, who avails himself of it to exact an unconscionable bargain, equity will relieve on account of the advantage and hardship. When the inadequacy of the price is so great that the mind revolts at it, the Court will lay hold on the slightest circumstances of oppression or advantage to rescind the contract."

In *Osgood v. Franklin*, (2 John Ch., 23) Chancellor Kent says: "There is no case where mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a sale made between parties standing on equal ground, and dealing with each other without any imposition or oppression. And the inequality amounting to fraud must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense."

When a person gives \$25,000 worth of property for \$1,000, as in this case, the inadequacy is so very gross, that the Court ought to "lay hold on the slightest circumstance of oppression or advantage," to set aside the sale. The fact itself furnishes good ground to conclude that the party was laboring under some controlling necessity, or was oppressed or was ignorant of the true value of the property.

The true explanation of this matter is to be found in the solution of the question—was the complainant the lawful wife of the deceased? If she was, the inadequacy of the price is so gross and palpable that the inference is almost irresistible that the parties who procured her to sign the deed took advantage of her situation, ignorance or some particular circumstances in her relation to the deceased, to induce or compel her to do so, and thereby intentionally obtained an unconscionable advantage to themselves which they ought not to be allowed to retain.

1870.]

Opinion of the Court—Deady, J.

On the other hand, if the parties were not married, but merely living together in an unlawful manner, the matter is easily explained. The complainant, in that case, being in fact not the widow of the deceased, but only his mistress, would not be entitled to any share or interest in his property, and the deed and the professed consideration therefor would be as stated in the answer, only a plausible and decent sort of a contrivance between the parties to make some pecuniary provision for the complainant so as to enable her to leave the country and at the same time, as far as possible, conceal from the general public the improper nature of the deceased's relations with her.

The question of marriage or no marriage is often an embarrassing one to decide, particularly when the evidence is wholly circumstantial and the question arises between the issue of the alleged marriage and third persons, after the parties themselves have passed away. In this case the proof is wholly circumstantial, and the question arises between one of the parties to the supposed relation and the heirs of the other. The suit is maintained by that party not for the purpose of establishing her status as the once wife now widow of the deceased, but for the more practical one of obtaining a widow's share of his property as against his children and heirs. In this view of the matter, it may be considered as a suit between the deceased and the complainant to determine a claim to property unembarrassed by any consideration of the consequences of such determination upon the status or rights of third persons.

The answer admits the cohabitation of the parties as alleged in the bill, but denies the marriage. The complainant produces no direct proof of marriage, but relies upon the circumstances attending and surrounding the cohabitation as sufficient, in connection with that fact, to warrant the inference that a marriage had in fact taken place between the parties, at some time subsequent to the complainant's going from Portland to San Francisco, to meet the deceased on his return from New York.

On the trial the complainant put in evidence four letters written by the deceased to herself while he was making a

Opinion of the Court—Deady, J.

[April,

voyage to New York *via* the Isthmus, dated between October 15 and November 12, 1865, and also one dated December 3, 1865, purporting to be written by John Altman—who is claimed to be the father of complainant—to the deceased. The two sons of the deceased, Thomas J., Jr., and Byron, and his son-in-law, Strowbridge, were examined as witnesses, besides other persons not connected with the family, as to particular acts and declarations of the deceased concerning the complainant and his relations with her.

It appears that at the time of his death Thomas J. Holmes was about fifty years of age, and that the youngest of his children was then quite grown up. That for at least sixteen years he had lived in Portland, and until 1865 with a second wife, not the mother of any of his children, who then died. That the complainant is near forty years of age, and was never married, unless to the deceased. That a few years before 1865 she was living with one Capt. Lyle as his mistress, who then died without making any provision for her; and that afterwards, and before the alleged marriage with the deceased, she was an inmate of a brothel in Portland; and that during some portion of the year 1865, and both prior to and at and after the death of Holmes's second wife, he kept and maintained the complainant as his mistress, in a house belonging to himself, at the corner of C and Third streets, in the immediate vicinity of his home, and where his wife aforesaid and several children then lived.

After the death of Holmes' wife in August, 1865, and sometime in the early part of October of that year, the deceased left Portland on a voyage to New York. A portion of Holmes' children continued to reside in the home house. It was during this separation that Holmes wrote complainant the letters above-mentioned. After Holmes left for New York, complainant continued to live at the house at the corner of C and Third streets, at the charge and expense of Holmes, until in the December or January following, when, probably in pursuance of a suggestion from Holmes, she proceeded to San Francisco, to meet him on his return from New York. In the month of April, 1866, or thereabouts, both of the parties returned to Portland, and thereafter con-

1870.]

Opinion of the Court—Deady, J.

tinued to live together in the home house of the deceased, until his death, in June 18, 1867—which was sudden and unexpected.

This is a substantial statement of the general circumstances disclosed in the testimony, which tend to show the condition of the parties at or for sometime prior to the period when the relation of marriage is said to have commenced between them, and their conduct towards one another afterwards.

Besides these there are some special circumstances upon which the complainant relies as testimony to show a marriage between herself and Holmes.

Sometime in the summer of 1866, or within two or three months after Holmes returned from New York, Mr. Lakin testifies that Holmes brought complainant to the store where he was employed, and introduced her to him as Mrs. Holmes, and told him to let her have what she wanted and he would pay for it. After this, witness “sold her a considerable number of goods.” Sometimes she paid for them, and sometimes they were charged to Holmes. Once or twice witness delivered parcels at the home house on C street, and saw Holmes and complainant there, as if living together then. Witness had known Holmes well in Portland for fifteen years, but this was all he knew of his relations with the complainant or of any recognition of her as his wife, or otherwise.

A. P. Ankeny testified that he had known Holmes many years, and had had confidential conversations with him. That he knew nothing particularly of the complainant, but had known her on the street for two or three years before Holmes’ death. Saw Holmes and her together on the street once, and once at Holmes’ house. Some two, or three, or four months before Holmes’ death, in general conversation with witness, Holmes referred to complainant as his wife, and remarked that he had spent more happy hours in the last six months, than for twenty years before. That within three or six months before Holmes’ death, at the office at the theatre, at request of Holmes, witness, in company with another person, whose name is not remembered, signed a

Opinion of the Court—Deady, J.

[April,

paper as a witness, which he supposed to be a will, and which Holmes then said, related to his effects, and that he had made provision for his wife, meaning the complainant. The statements of Mr. Ankeny were somewhat general and indefinite, and he did not profess to give the language of Holmes, but only the substance of it; besides, it is not unlikely, that in the lapse of time, he has in some degree, confounded his general impressions of the matter with the conversations themselves.

D. W. Williams testified that in June, 1866, he was Commissioner of Deeds, for California, and that Holmes asked him to come to his house and take his wife's acknowledgement to a deed for property in California. That he knew Holmes, but not complainant, and that he went to his house, and there Holmes introduced him to a person whom he called his wife, and who signed and acknowledged the deed as his wife. That Holmes also signed and acknowledged, and that both parties told him that the property in question belonged to the wife. That because of some informality in the deed it was returned and re-acknowledged twice before him, under similar circumstances. The testimony of Mr. Williams was direct and certain, and it shows that either the parties were then, or supposed themselves to be husband and wife, or that they went through this proceeding before the Commissioner for the purpose of producing the impression in this community that they were married, so as to prevent their cohabitation from giving rise to unpleasant comment and scandal, or it may have been that they had in some way held themselves out as husband and wife in California, and therefore the purchaser would not take the deed unless executed by Holmes, as well as the complainant.

Dr. I. A. Davenport testified that he had known Holmes for some time, and that he first became acquainted with complainant a few weeks before Holmes went to New York, in 1865. The complainant was then known by the name of "Clara," and Holmes had introduced her to witness by that name. Soon after Holmes' return from New York, witness said that he introduced complainant to him *as his wife*; but upon further examination he stated the occurrence in these

1870.]

Opinion of the Court—Deady, J.

words: “When Holmes asked me to go down to his house, I said how shall I address ‘Clara?’” and he said as Mrs. Holmes. The witness also testified that he was Holmes’ physician, and that he visited the house in that capacity, and that the parties lived together as man and wife, up to the time of Holmes’ death. It is apparent from the circumstances that Dr. Davenport was upon intimate and confidential relations with the deceased, and also the complainant. For instance, it appears from the correspondence of the deceased, that he repeatedly warns her against receiving visits from men during his absence, but he more than once commends witness to her, both as a physician and a friend. It also appears that witness is not upon good terms with Strowbridge and T. J. Holmes, Jr., and that he is very friendly to complainant and sympathizes with her. Supposing that at this time the parties really were married, it is singular that Dr. Davenport, the confidential friend of both parties, did not know it, and that he should ask Holmes on the way to the house—“How shall I address ‘Clara?’” The very question implies that while he knew the parties were living together, yet that he had no reason to believe they were husband and wife, but was in doubt in what light Holmes wished his connection with the complainant thereafter to be regarded. For instance, whether, as in the past she was to be considered and treated under the professional name of “Clara,” simply as his mistress, or whether he wished to impart to the relation some appearance of decency and legality by treating and addressing her as Mrs. Holmes. It is also remarkable, that although witness and Holmes were, as we may reasonably suppose, living in daily communication for more than a year after this marriage is alleged to have taken place, nothing appears to have ever been said about it between them, nor does it appear that Holmes in any way ever declared or intimated to witness that he had married complainant, or that she had ceased to be his mere mistress, except on the one occasion, when in reply to the direct inquiry, he told witness to address her as Mrs. Holmes.

Mr. Hamilton Boyd testified that he was well acquainted with Holmes in his lifetime, but did not know complainant.

That he had a conversation with Holmes, in which H. asked him what he thought of his marriage, as the witness understood, referring to the complainant. Witness “tried to pass it off, and said he knew nothing about it.” Holmes repeated the question. Witness replied “he had heard rumors to that effect, but he never believed them.” Holmes did not then say that he *was* married, but repeated the question—“What do you think of my marriage?” to which the witness then replied—“It is in very bad taste”—whereupon the subject was dropped.

The testimony of this witness was distinct and unqualified. He and Holmes appear to have sustained friendly relations to one another, and no reason is apparent for any concealment or mystery between them about any matter which in itself was lawful and proper. Holmes seems on this occasion, as on others, to have studiously avoided making an explicit admission that he was married to the complainant, while at the same time his conduct and expressions were calculated to give color to the impression or rumor that a marriage of some kind had taken place between them in California, before returning to Portland, in 1866.

The conversation itself is ambiguous and may be considered as evidence, either that a private marriage had taken place between the parties, about which Holmes was then feeling the pulse of his friends as to the propriety of making public, or else that there was no marriage, but some kind of a promise or understanding that there should be one, and he was endeavoring in this way, to ascertain how a marriage with such a person as the complainant would be regarded by his friends and the public.

In addition to these special circumstances, the complainant relies upon Holmes’ letters to herself, as furnishing sufficient evidence of a promise to marry the complainant at some future time. Assuming the promise *per verba de futuro* to be so proved, it is maintained that this engagement and the subsequent copula, amount in law, to a present consent, and constitute sufficient evidence of marriage. The reason assigned for this conclusion is, that the law presumes the copula was allowed on the faith of the marriage promise;

1870.]

Opinion of the Court—Deady, J.

and that so the parties, at the time of the copula, accepted each other as husband and wife.

The proposition is substantially stated in the words of Bishop on Marriage and Divorce, Sec. 90, where it is laid down that, in the absence of any statute requiring specified forms and ceremonies, a marriage is constituted by the mere consent of the parties, and that such consent is to be presumed when the copula follows upon a promise to marry in the future.

But this doctrine is directly denied in *Cheeny v. Arnold*, 15 N. Y. 345. Denio, C. J., delivered the opinion of the Court, which was concurred in by his associates. The syllabus contains the point of the opinion, and is as follows:

“A contract to marry, *per verba de futuro*, though followed by copulation, does not amount to a marriage in fact. Such a contract, with cohabitation upon the faith of it, was ground for a decree enforcing a performance, by formal solemnization, in the ecclesiastical courts, and was for some purposes regarded as a valid marriage by the canon law, but, it seems, never constituted a valid marriage at common law.”

It must be admitted that there are some dicta of American jurists to the contrary of this case, and in accord with the rule maintained by Bishop; but *Cheeny v. Arnold* is later than these dicta, and carries with it the authority of an express adjudication. This is a vexed question, but I am much inclined to follow the opinion expressed by Chancellor Walworth, in *Rose v. Clark*, 8 Paige Ch. 579, that at common law no marriage was valid unless celebrated *in facie ecclesiae*. In the earlier editions of Kent's Commentaries, (part 4, 87) it was stated, that:

“If the contract be made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made *in facie ecclesiae*.” Upon this proposition the Supreme Court of the United States in *Jewell's lessee v. Jewell et al.* (1 Howard 234,) were equally divided and gave no opinion.

Opinion of the Court—Deady, J.

[April,

In a later edition of the commentaries this proposition is materially qualified by inserting after the words—"it amounts to a valid marriage" *in the absence of all civil regulations to the contrary*. This qualifying clause is found as early as the seventh edition, published in 1851, while the case of *Cheeny v. Arnold* was not decided until 1857. Modified by this clause—in the absence of *all* civil regulations to the contrary—the proposition in Kent amounts to nothing more, than that in a *state of nature* no particular form or ceremony is necessary to give validity to the consent of the parties to the contract to become husband and wife, and the same may be said of any other contract.

But admitting that the law upon this question is with the complainant, and that a contract *per verba de futuro cum copula* constitutes a marriage, is there any such contract in this correspondence? It will not be pretended that it contains any express promise to marry the complainant at any time, or an express admission that an engagement to marry ever existed between the parties. Nor do I think that any such promise or engagement can be reasonably inferred from the correspondence, when read by the light of the surrounding circumstances.

The correspondence consists of five letters, purporting to have been written by Holmes to complainant. They are dated October 15, 16, 24, 29, and November 12, 1865. The first two were written at San Francisco, immediately upon his arrival there; the next two on board the *Golden City*, between San Francisco and Panama, and the fifth and last one, at New York. The first one is incomplete, being evidently continued on a second sheet, which is not produced. The omission is unexplained, and the presumption is that the missing portion of the letter would not, if produced, be favorable to the complainant's case, but the contrary. There is no doubt about the authenticity of the letters. Mr. Shattuck, one of the complainant's attorneys, testified that he received the letters from the hand of his client, a short time before she left for San Francisco, and that she left for that place about one and a half months before this suit was commenced. Byron Holmes also testifies that they are in the handwriting of his father.

1870.]

Opinion of the Court—Deady, J.

The letters are addressed to “Dear Clara,” and are quite voluminous. Their general character, is all that can be stated here. Here and there they contain expressions which readily admit of being understood in a gross and indecent sense. The language and sentiments of the correspondence, and the topics discussed in it, clearly indicate that the parties had been living in a state of concubinage or worse, and that the relation between them was a mere convention by which they agreed *hereafter*, to commit fornication *only with one another*.

The writer is constantly assuring the complainant of his continence and fidelity to her, notwithstanding the many strong temptations which surround him, and as constantly cautioning the complainant against visiting houses of prostitution, or entertaining other men at her house.

True, there are some expressions in the correspondence that may be construed as indicating that it was the purpose of the writer to marry the complainant when he returned, if her conduct was satisfactory during his absence. Among these, the strongest are, that he regretted that he had forgotten the kind of goods she wanted for a wedding-dress, but would get something. That “the woman I marry must conduct herself during my absence so as to be above suspicion.” “If you wish to become an honored wife, you must not visit houses of prostitution.” No engagement to marry is alluded to, nor is the word “wife,” or “marriage,” or “marry” used, except as above stated.

Considering the previous lives and relations of these parties, an actual promise to marry, cannot reasonably be inferred from this correspondence. At best, it is merely evidence of a purpose or understanding that thereafter the complainant would give up her former vocation, and live with Holmes, exclusively, as his mistress.

Another circumstance connected with the correspondence, remains to be considered. In the letter of Nov. 12, Holmes writes that he is about ready to return to Portland, but that he will first visit complainant’s father, in Ohio, and that he would leave New York, for that purpose, on the 14th inst. Whether he went or not, does not directly appear, but I

Opinion of the Court—Deady, J.

[April,

infer not. However, a letter is produced in evidence, dated "Felicity, Ohio, Dec. 3, 1865," addressed to "Mr. Thomas J. Holmes," and signed "John Altman," and endorsed in the handwriting of Holmes—"From John Altman to Thomas J. Holmes." This letter came from the custody of the complainant with the others. It is brief, and begins by acknowledging the receipt of one from Holmes of "17th of November, with \$20, enclosed, for which you will please accept my thanks," and proceeds—"you also desire my consent to a union with my daughter. Upon this delicate question I hope my consent is given to a gentleman of honor, of kind heart and tender feelings, and that the result will be for the good and happiness of you both, in the future. With these few lines, hoping to hear from you soon, I subscribe myself yours, respectfully."

It cannot be denied, that upon the face of this letter it is asserted that Holmes, in his, of the 17th of Nov., had in some way, made a proposal of marriage with "Altman's daughter." What her name was, and why the proposal was accompanied with the exact sum of \$20, does not appear. But why is not the letter from Holmes containing this proposal produced? If received by complainant's father, it is presumed to be in his custody, and at her service. If it was lost or destroyed, she could have her father's deposition taken and prove that fact and its contents. The omission to do this is sufficient to cast suspicion upon the integrity of this so-called Altman letter.

Besides one would hardly think that Holmes would deem it necessary to ask permission of her father or any one else, unless it was his own family, to marry a person in the situation the complainant then was, and had been. Admitting, however, that the letter was written by complainant's father, in response to one from Holmes, asking her hand in marriage, it cannot be believed in the light of all the other circumstances, that either Holmes or the complainant ever seriously intended anything by such proposal, other than to make an impression upon some one. For instance, the complainant knowing, or having good reason to believe, that she was regarded at home, as a lost, or fallen woman, might

1870.]

Opinion of the Court--Deady, J.

have suggested or assented to this application as a means of restoring herself in some degree, in the estimation of her family and friends.

These are all the special circumstances relied upon by the complainant, to prove a marriage in fact, between herself and Holmes. Neither the time or place of the alleged marriage is stated in the bill, and in the argument for complainant it was claimed that it might have taken place, either in Oregon or California, or at sea between here and Panama. Admitting that the marriage might have taken place where there were no civil regulations prescribing specified forms and ceremonies as necessary to give validity to the consent of the parties, in my judgment these circumstances are not sufficient to prove either a marriage *per verba de futuro cum copula* or *per verba de præsenti*.

The question of marriage or no marriage in this case, arises between one of the parties to the alleged relation, and the legal representatives of the other. The determination of it does not involve the rights or status of innocent third persons, who have honestly given credit to and acted upon the appearances of a marriage between the parties, or who are the issue of such parties, under circumstances where marriage was even possible. The complainant claims one third of the property left by Holmes, as against his own children and natural heirs, upon the single ground that she was his lawful wife at the time of his death. The burden of proof is upon her, to show this fact, and it is not sufficient, to show that there *might* have been a marriage, but she must prove the fact directly, by the evidence of those who witnessed the contract, or by such an array of circumstances as admit of no other reasonable conclusion. It must also be a lawful marriage, contracted or celebrated according to the law of the land. The complainant contributed nothing to the accumulation of this property. She is in no sense or degree the meritorious cause of it. She went from a brothel to live with the deceased, even while his second wife was still living, and was supported by him in ease and luxury for nearly two years. She bore him no children, and probably rather gained than lost by the transaction. This

is the extent of her merit so far as this property is concerned. Whatever she is entitled to, the *law* gives her as the *widow* of the deceased, and not otherwise, and she cannot complain if she is required to prove with reasonable certainty, the fact upon which her claim rests—a marriage with the deceased.

Now, if any marriage ever took place between these parties, it must have been either in the State of Oregon or California. There is nothing in the evidence to warrant the conclusion that the parties ever met elsewhere, except on the steamer on the return voyage from San Francisco to Portland. This Court takes judicial knowledge of the law of California. Upon the subject of marriage it provides:

“No person shall be joined in marriage unless such person shall have first obtained a license therefor, from the Clerk of the County Court, * * * which license shall authorize any Judge, etc., to celebrate and certify such marriage.” (Hittell’s Laws Cal. 4,466.)

This language is mandatory, and prohibits persons from being joined in marriage except upon the conditions therein prescribed.

The law of this State provides similarly:

“Before any persons can be joined in marriage, they shall produce a license from the County Clerk * * * directed to any person, etc., authorized by this act to solemnize marriage, and authorizing such person, etc., to join together the persons therein named, as husband and wife.” (Or. Code, 785.)

But what follows is still stronger and more direct:

“In the solemnization of marriage no particular form is required, except that the parties thereto shall assent or declare in the presence of the minister, priest, or judicial officer solemnizing the same, and in the presence of at least two attending witnesses, that they take each other to be husband and wife.” (Or. Code, 783.)

The consent to become husband and wife—the contract out of which arises the relation—must be given as herein prescribed—before a person authorized to solemnize marriage, and in the presence of two witnesses. Without the

1870.]

Opinion of the Court—Deady, J.

observance of these formalities, the marriage relation, it seems to me, cannot be created within the States of Oregon and California, particularly the former. Neither ought it to be. To prevent fraud and litigation, the law wisely requires certain contracts to be in writing, and signed by the parties. A single rood of land cannot be conveyed except by the deed of the vendor. How much more important it is to society and individuals, that the contract upon which rests the marriage relation, the most important of all others, should not be made except with such attending circumstances and formalities as will serve to manifest the consent of the parties beyond question, and also preserve the evidence of it. For instance: If this marriage was contracted in Oregon or California, according to the laws of either State, it would have been done before some person authorized to celebrate marriage and make a record of it, by which the fact could be proven directly, and beyond dispute.

Nor do I think that citizens of this State, as the complainant and deceased were, can purposely go beyond its jurisdiction, and not within the jurisdiction of another State, *as at sea*, and there contract marriage contrary to its laws. Such an attempt to be joined in marriage is a fraudulent evasion of the laws to which the citizen of the State is subject and owes obedience, and ought not to be held valid by them.

In *Milford v. Worcester* (7 Mass. 48), a certain man and woman came before a magistrate authorized to celebrate marriage, and requested him to marry them. He refused, but the parties then and there, in the presence of the magistrate and other witnesses, declared that they took one another for lawful husband and wife, each making to the other the vows and promises usual in contracting marriages. The statute does not require any form of words for the solemnization of marriage, but that the contract was to be solemnized before a justice of the peace or minister. The action was by the issue of these parties claiming to be their legitimate children, and the question was, whether there was a valid marriage or not between their parents, and it was determined in the negative. Parsons, C. J., delivered the opinion of the Court. In the course of it he says:

Opinion of the Court—Dedy, J.

[April,

“Marriage, being essential to the peace and harmony, and to the virtues and improvements of civil society, it has been, in all well regulated governments, among the first attentions of the civil magistrate to regulate marriages; by defining the characters and relations of the parties who may marry; so as to prevent a conflict of duties, and to preserve the purity of families, by describing the solemnities by which the contract shall be executed, so as to guard against fraud, surprise and seduction; by annexing civil rights to the parties and their issue, to encourage marriage, and discountenance wanton and lascivious cohabitation, which, if not checked, is followed by prostration of morals and a dissolution of manners; and by declaring the causes, and the judicatures for rescinding the contract, when the conduct of either party and the interest of the State authorize a dissolution. A marriage contracted by parties authorized by law to contract, and solemnized in the manner prescribed by law is a lawful marriage; and to no other marriage are incident the rights and privileges secured to husband and wife, and to the issue of the marriage.”

“It has been truly observed by the counsel for the plaintiffs, that a marriage engagement of this kind is not declared void by any statute. But we cannot thence conclude that it is recognized as valid, unless we render in a great measure nugatory all the statute regulations on this subject.”

“But a marriage, merely the effect of a mutual engagement between the parties, or solemnized by any one not a justice of the peace or an ordained minister, is not a legal marriage, entitled to the incidents of a marriage duly solemnized. The woman, when a widow, cannot claim dower, nor the issue seizin by descent.”

“Whether cohabitation, after such a pretended marriage, will subject either of the parties to punishment, as guilty of fornication, may depend on circumstances. If either of the parties were circumvented, and verily supposed the marriage legal, perhaps such party would be protected from punishment, on the general principle, that to constitute guilt, the mind must appear to be guilty. But every young woman of honor, ought to insist on a marriage solemnized

1870.]

Opinion of the Court—Deady, J.

by a legal officer, and to shun the man who prates about marriage condemned by human laws, as good in the sight of heaven. This cant, she may be assured, is a pretext for seduction; and if not contemned, will lead to dishonor and misery.”

But I am aware that there are some loose dicta scattered through the books, to the effect that a mutual engagement to marry between parties capable of contracting marriage, is valid, and constitutes a marriage, although not entered into or made, according to the forms and before the person prescribed by the local law, unless the same is thereby expressly declared void. Without in any degree assenting to this doctrine, let it be assumed for the moment to be the law applicable to this case, while we consider whether the circumstances justify the inference that any such engagement took place between these parties.

First, it must be borne in mind that under the circumstances there was little or no inducement for marriage between these parties. They had long passed the heyday and romance of youth. Their acquaintance did not commence in innocent and honorable courtship and love, but in a mercenary and criminal commerce. No innocent offspring bound them to one another, or appealed to them for protection and legitimacy. The deceased was a man in the decline of life, with a handsome fortune and a grown-up family of sons and daughters. With him the primary object of marriage—the procreation of children—had been long accomplished, and the secondary one—the avoiding of fornication—does not appear to have much concerned him. The complainant was also well advanced in years, and, considering her past career, was not likely to have sought marriage for either the primary or secondary object of that relation. In my judgment, the most reasonable inference from even the circumstances which are claimed to favor the hypothesis of marriage is, that the parties, after the death of Mrs. Holmes, agreed to live together *as* man and wife, that she was to be faithful to him, and he to her, as long as they lived, or remained connected. This, of course, was not an agreement then to marry, but to live together *like* husband and wife. Holmes

had wealth and a home, and she was poor and out of the pale of society. She had lived as the mistress of one man, and afterwards as a prostitute. As she appears, from the testimony, there is no reason why she should decline to be Holmes' mistress, or why he should go so far as to offer her marriage as a consideration for the exclusive enjoyment of her person or society.

The parties having agreed to live together upon this footing, it was only natural that in some respects, particularly when third persons were present or concerned, they should treat one another as man and wife. Besides, Holmes had lived long in this community, and may be expected to have had some regard for appearances, as well for his own sake as that of his children around him. Indeed, at times, for this reason, he may have seriously contemplated marrying the complainant; but when he sounded his friends about the matter, as in the conversation with Boyd, and heard their opinion of the propriety of it, he shrunk back or procrastinated the matter. He might also have intended to have made provision for her in case of his death, which was sudden, and, doubtless, many years before he expected it.

But this agreement to live together bound neither of them, nor did it change their status or relation to one another. Living together as man and wife, although evidence of a previous marriage, particularly so far as third persons are concerned, cannot make parties man and wife. Nor can any length of cohabitation, however exclusive, ever constitute the relation of marriage. Marriage is a relation, as much so as that of parent and child. It is founded in contract—in the consent of the parties. That consent must be mutual and absolute *per verba de præsenti*,—not merely to live together exclusively, but to become joined to one another in the estate of matrimony.

In *Letters v. Cady*, (10 Cal. 527,) the plaintiff sued as the widow of Cady for a share of his estate. Her complaint avowed that in 1853 she “was keeping a restaurant and public saloon in Grass Valley, and that she had accumulated in this business five or six hundred dollars; that the deceased made proposals of marriage to her, which she accepted, and

1870.]

Opinion of the Court—Deady, J.

consented to live with him as his true and lawful wife; that in accordance with his wishes she relinquished her business, sold her property, 'and from thenceforth lived and cohabited with him as his wife, always conducting herself as a true and faithful and affectionate wife should do.'" There was a demurrer to the complaint.

FIELD, J., delivered the opinion of the Court. After stating the case as above, the opinion proceeds:—

"These are all the averments respecting the marriage, and they are entirely insufficient. The facts alleged do not constitute a marriage. They are only *prima facie* evidence of a marriage. Living together 'as man and wife' is not marriage, nor is an agreement so to live a contract of marriage. From the character of the allegations, and the pregnant fact that the plaintiff does not even sue in her marital name, except under an *alias*, we are led to the inference that the arrangement between her and the deceased was intended to be temporary, and the connection one to which it would be a perversion of language to apply the name of marriage."

But there are other circumstances disclosed by the testimony, the necessary inferences from which are overwhelmingly against the hypothesis that any marriage, or contract of marriage, ever took place between these parties, besides the direct testimony of some of the defendants to the admissions of the complainant to the contrary.

Byron Holmes, the younger son of the deceased, testified that he lived in the home house with the parties from the time of their return from San Francisco, in the spring of 1866, to the death of his father; and that he never heard the complainant addressed or spoken of by the deceased or other person otherwise than as "Clara." That he never asked her, directly, if she was married to his father, but in conversation she often told him, both before and after his father's death, that she claimed none of his property, and in reply to a question from complainant's counsel, he swore positively that in a certain letter, written by deceased to witness from San Francisco, in March, 1866, he did not inform witness that he had married complainant, but did say to

him “that he had not or would not marry her.” The witness also said that he had not this letter in his possession, but would produce it if counsel desired, but its production was not insisted upon by complainant.

Thomas Holmes, Jr., and Strowbridge, the administrators of the estate, both testified that soon after the death of Holmes, and while complainant was still in the house of the deceased, they conversed with her about her right to administer upon the estate, and informed her that if she had a certificate of marriage with Holmes, her right to administer should not be questioned. At first she said she had a certificate, but had promised Holmes never to produce it or show it to any one; but upon further conversation she burst out crying and acknowledged that she had no certificate, and had not been married, and that it was the second time she had been fooled, or deceived. Said she desired to go to her father, near Cincinnati, and wanted to know if witnesses could not raise her a certain amount of money to go with. Of course the fact must not be overlooked, that these defendants have a large pecuniary interest in the result of this suit. But that does not necessarily discredit their testimony, although it furnishes a reason why it should be carefully considered and scrutinized. Judging from the manner of the witnesses, the intrinsic probability of their statements and the absence of any direct contradiction of them, I see no sufficient reason for not believing them.

A. Johnson, called by complainant, testified that he had known Holmes for about fifteen years, but did not know complainant. That he was quite intimate with him, but never heard him say anything particular about complainant, and never heard him refer to her as his wife, or speak of being married. Add to this, that it does not appear that any one ever visited or received them as husband and wife, or that they ever appeared in public together, and that notwithstanding all the friends and acquaintance, which Holmes, from his wealth and long residence must have had here, no one is produced who ever heard him say that he was married to the complainant.

1870.]

Opinion of the Court—Deady, J.

The very fact that the complainant released all interest in the property of the deceased, worth \$25,000, for the insignificant sum of \$1,000, is itself enough to raise the presumption that she did not then believe herself the widow of Holmes, and legally entitled to one third of his property. True, she might not have been aware of the exact value of the property, but she must have known that Holmes was a man of considerable fortune, and that the dower of his wife was worth many thousand dollars. His wealth appears to have consisted almost wholly of town property in the city of Portland, and from her residence in the city, and intimacy with the deceased, she must have had a tolerably correct impression of the value of his estate. I am unable to discover anything in the evidence, or the circumstances of the parties to justify the conclusion that any advantage was taken of the complainant to obtain this release. She was of mature age, had seen the world, and was not likely to have been prevented by shame or mortification from coming before the public and asserting her rights, if necessary. A woman with a reasonable claim for \$25,000 upon a solvent estate of a deceased person need not want for friends to assert her claim, in this country. She appears to have had communication with persons outside of the family of the deceased. Dr. Davenport visited her more than once, and Ferry once. They both conversed with her privately. Ferry appears to have taken an interest in her, and advised her that the best friend she could have was a good lawyer, and doubtless would have procured her an interview with one at any time. Dr. Davenport appears to have been her friend, as well as physician, and if she had desired it, was abundantly capable, and doubtless willing, to aid her in the assertion of any right she might have had as the widow of Holmes. Indeed, there is not much room to doubt but that he knew, directly or indirectly, from the parties themselves, what the real relation between them was; and I am satisfied that if he had had reason to believe that complainant was ever married to Holmes, he would have counseled and assisted her to maintain her right as his widow. Taken altogether, considering particularly the gross inadequacy of price, this sale of dower

Opinion of the Court—Deady, J.

[April,

must have been either brought about by the defendants obtaining some controlling and unconscionable advantage over the complainant, or else it was a mere amicable and plausible contrivance between the complainant and defendants, to give the former an opportunity to leave the country with sufficient means for respectable appearances, and at the same time conceal from the public, as far as possible, the fact that she and their father had been living together in a state of concubinage. In support of the first proposition there is only the single fact of the gross inadequacy of price, and that is a sword that cuts both ways, while all the facts and presumptions of the case are either reconcilable with, or directly tend to establish the truth of the second one, and I have little doubt but that it is the correct conclusion from the premises.

In pursuance of this contrivance, and as part of it, the recitals concerning the complainant's agreement not to claim the property of the deceased were inserted in the deed, and she was also described therein and in the petition for letters of administration as the widow of Holmes. It can't be possible that any woman knowing herself to be the lawful wife of Holmes, and entitled to his name and one third of his comparatively large fortune, would quietly consent to relinquish all this for \$1,000, and also to leave the country, under circumstances which she must have known and felt, were a tacit admission to the contrary.

But the insuperable objection to the theory of marriage in this case, arises from the silence of the complainant. If it be true that she was ever married to Holmes according to law, or that he ever attempted or pretended to marry her in any way, or by any means, or that he ever promised to marry her, the complainant knows it, and can state the fact with the essential circumstances of time and place. A woman is not likely to forget when and where she was married, whether according to the forms of law, or otherwise. In this case, there is every inducement for the complainant to state the fact, if it be a fact. Her honor and a fortune are depending upon it. That she is not insensible to the latter consideration, the bringing of this suit bears witness.

Yet she does not even state in her bill that she was mar-

•

1870.]

Opinion of the Court—Deady, J.

ried to Holmes. She only alleges in general terms, that she “was the lawful wife of the deceased, and lived and cohabited with him *as* his wife, from the —— day of December, 1865, to the time of his death.” Whether she was “the lawful wife of the deceased,” or not, is a question of law and fact, and no facts are stated on which to base the conclusion that she was, except that she “lived and cohabited with him *as* his wife”—that is *like* his wife, after the manner of a wife. Now, *living* with the deceased, however long or in whatever manner, would not make her his wife. Marriage is the legal result of a mutual and absolute engagement between the parties to be husband and wife. Prescription nor copula, either singly or combined, can never constitute marriage.

Again, the allegations in the bill, indefinite and unsatisfactory as they are, are not sworn to by the complainant. The bill, although it need not have been sworn to, is verified by one of complainant’s solicitors, who upon this point speaks, of course, from mere information derived from the complainant.

But why does she not appear here as a witness or give her testimony by deposition, and inform the Court particularly when and where and by what means she became the lawful wife of the deceased, and why, if such be the case, she released her dower, worth \$25,000, for the paltry and inadequate sum of \$1,000? The complainant is a resident of San Francisco, and there was nothing to prevent her from being a witness in the case, either in person or by deposition. The withholding of her testimony, under the circumstances, gives good ground for presuming that it would be adverse to her claim. She asks this Court to infer from circumstances that she was the lawful wife of Holmes, when she declines to come forward and testify to the fact under the sanction of her oath.

This circumstance alone is enough to convince any one that whatever agreement or understanding there was between her and Holmes, as to living together—and I have no doubt there was some—they never were married, or engaged to be married, in any sense of the word.

A decree must be given dismissing the bill.

DANIEL MORRISON v. THE STEAMBOAT PETALUMA, ETC.

DISTRICT COURT, DISTRICT OF CALIFORNIA,
APRIL 13, 1870.

1. COLLISION, APPORTIONMENT OF DAMAGES.—Collision between a steamboat and vessel at anchor, in a fog. Damages apportioned, it appearing that the vessel had neither a bell nor a fog-horn, and that the steamer failed to moderate her speed.

Before HOFFMAN, District Judge.

Messrs. McAllisters & Bergin, Proctors for libellant.

Sol. A. Sharp and Milton Andros, Proctors for claimant.

HOFFMAN, J. The schooner William Hamilton, while on a voyage from Antioch to Oakland, on the third day of February, came to an anchor abreast the stone quarry near the southerly end of Angel Island. The tide was ebb, the weather very foggy, and there was no wind. She was obliged to anchor, as she had reached a point where she was liable to drift with the ebb tide towards the Heads.

She had on board a master and one man. They both admit that there was neither a bell or a fog-horn on board, but they state that at short intervals they endeavored to warn approaching vessels of their presence by shouting and by striking the brakes of the windlass with an iron bar.

About 5½ o'clock the steamboat Petaluma, bound from Petaluma to this city, collided with the schooner, inflicting such injury as to lead the men on board the latter to jump instantly upon the steamer to save their lives. The schooner was thereupon abandoned. She has since been recovered and is now on the beach at Sausalito.

It is not disputed that a dense fog prevailed at the moment of the collision. The schooner was first seen by the master, the pilot, the lookout of the steamer, and by several of the passengers, at a distance of from two hundred to three hundred feet; and as soon as under the circumstances she could possibly have been discovered, everything appears to

1870.]

Opinion of the Court—Hoffman, J.

have been done by the steamer which skill and diligence could suggest to avoid the collision.

On the part of the steamer it is urged that the schooner was in fault in not having and using a bell, or at least a fog-horn.

Act 10 of the "regulations for preventing collisions on the water," provides (Act of April 29, 1864, 13 Stat. at Large, p. 60) as one of "rules governing fog signals," that "whenever there is a fog, whether by night or by day, the fog signals described below shall be carried and used, and shall be sounded at least every five minutes. Sailing ships under way shall use a fog-horn. Steamships and sailing ships, when not under way, shall use a bell."

These provisions are positive and peremptory. There would seem to be more necessity for their observance by coasters and small craft navigating internal waters, frequented by steamers and other vessels, than by ships navigating the high seas. The schooner *Hamilton* was an enrolled vessel, and subject to the laws regulating the commercial marine of the United States.

She was, therefore, clearly in fault in not sounding a bell as required by law. It is not disputed that at the moment the schooner was discovered, the steamer was going at her usual rate of speed—probably with the ebb tide—from twelve to fifteen miles an hour.

The 16th article of the regulations provides that "every steamship shall, when in a fog, go at a moderate rate of speed."

In excuse for non-compliance with this regulation, it is urged on the part of the steamer, that it is necessary in foggy weather to run by compass, and that the position of a steamboat can be known only by timing her, and thus estimating the distance, and that to do this it is necessary for her to run at her usual rate of speed. This excuse is but an attempt to justify a deliberate violation of the Act of Congress. A similar excuse was rejected, even before the passage of the act of 1864, by the Supreme Court, in the case of *McCready v. Goldsmith* (18 How. 91). In that case the Court observes: "A passenger on board who witnessed

the collision, was struck with the impropriety of the rate of speed, and asked why they ran so fast in a fog, and was answered that it was necessary in order to enable them to keep their reckoning in going from place to place. And we learn also from the testimony of the pilot and some others, that they make no difference in the rate of speed in consequence of a fog; that they go slow when making land or a light, or in narrow passages, and when sounding the lead—as if the only precautions they were bound to observe, in the navigation, was as it respected the safety of their own vessel. We will only repeat what we said in the case of *Newton v. Stebbins*, (10 How. 606), ‘that it may be matter of convenience that steam vessels should proceed with great rapidity—but the law will not justify them in proceeding with such rapidity, if the property and lives of other persons are thereby endangered.’”

A similar opinion to that referred to by the Supreme Court seems to be entertained by some of the steamboat captains in these waters. Captain Bromley, of the “Julia,” in reply to a question of the Court, says: “When I say it is safest to keep up the usual rate of speed—I mean for the steamboat. If we are going along looking out for vessels, of course we go slow; most of them have horns, and we have our steam whistles.”

The latter course is precisely the one which the Act of Congress requires steamers to adopt.

It is also urged that it is safer to go at a high rate of speed, because the course of a vessel can in that case be more suddenly deflected than if her rate of speed be low.

This, again, is an attempt to justify a deliberate violation of law; nor, though several witnesses have so sworn, does the reason assigned for maintaining a high rate of speed, appear to be well founded. Captain Bromley’s testimony alone furnishes a sufficient answer to it, and the conduct of the Petaluma, as disclosed by the testimony in this case, shows that her officers did not act upon the theory that in a fog vessels can be avoided by a steamer more easily at a high than at a low rate of speed. The officers of the Petaluma testify that, when warned of the approach of the up-

1870.]

Opinion of the Court—Hoffman, J.

boats by their steam-whistles, they slowed down, and continued at a low rate of speed, until the boats were seen and passed; when their usual rate of speed was resumed.

I am satisfied that not only the law, but sound policy require that all vessels should be held to an exact compliance with the regulations established for their governance by Act of Congress, and that their officers should be advised that for any violations of those regulations they will be held responsible, except in the cases contemplated by the 20th article of the regulations, and except that it appear by unquestionable proofs that the violation of the law in no degree contributed to the disaster.

Both vessels being thus found to be in fault, the damages must be apportioned. They will be ascertained by reference to the Commissioner.

ANDREA LARCO v. SCHOONER MARTHA AND ELIZABETH.

DISTRICT COURT, DISTRICT OF CALIFORNIA,

APRIL 13, 1870.

1. LIGHTS REQUIRED BY LAW MUST BE DISPLAYED.—A claim for damages by collision rejected; it appearing that the injured vessel omitted to display the lights required by law.

Before HOFFMAN, District Judge.

Messrs. *Sullivan & Ellsworth*, Proctors for libellant.

Milton Andros, Proctor for claimant.

HOFFMAN, J. On the night of the eighteenth January, the schooner *Aulalia*, which had that evening come in from sea, while at anchor in the strait which connects the Bay of Bodega with the ocean, was run into and damaged by the schooner *Martha and Elizabeth*, then entering the harbor to avoid an impending southeaster.

On the easterly side of the strait, by which the Bay of Bodega is reached, is a high bluff projecting into the sea, and

known as Bodega Head. On the westerly side is a low sand spit. Between these is a narrow and sinuous passage, varying in width from fifty to one hundred yards. At the immediate entrance of this passage, and opposite to the sand spit the shore line of the bluff is curved, and an indentation or bight is formed, but of no considerable depth. The formation of the harbor is such that vessels approaching it, especially from the southward and westward, are compelled to hug closely the shore of the bluff, and it is only after they have rounded its easternmost point that the bight is opened, and vessels lying there become visible. From this point to the place where the *Aulalia* lay, the distance is about two hundred yards. On the night in question the *Martha* and *Elizabeth* was entering the harbor by the customary route. She had on either side the light required by law. The mate and a seaman were forward as lookouts, and the master was at the helm.

It is admitted that neither the *Aulalia*, the *Ocean Spray*, which lay near her, and to the stern line of which she was attached, nor the *Otsego*, which lay a little further up, had any lights or lookouts. The master, mate, and the seaman of the *Martha* and *Elizabeth* testify that neither the *Aulalia* nor the *Ocean Spray* were discovered until the schooner had approached them within a distance of one hundred yards. Her helm was immediately put to port, her main sheet hauled in, and every effort made to avoid a collision. But the nearness of the vessels and the force of the ebb tide, rendered their efforts abortive, and the bows of the schooner struck the *Aulalia* amidships, carried her from her moorings, and apast the *Ocean Spray*, and up to the vicinity of the *Otsego*. The claimants contend that the absence of lights on the *Aulalia* and the other vessels near her was the real cause of the accident, and was also such a violation of the Act of Congress as will bar any claim for its consequences. On the part of the *Aulalia* it is urged that she was anchored on the beach, out of the channel, and where she was not required to show a light, and where no collision could occur, except through the gross fault and mismanagement of the colliding vessel. The place where the *Aulalia*

1870.]

Opinion of the Court—Hoffman, J.

lay is fixed by the witnesses with tolerable precision; but there is some discrepancy in the testimony as to whether she lay in the channel at the edge, or some ten or fifteen yards, or, as one witness says, thirty or forty yards inside of it.

The *Aulalia* came in at about eleven at night, when she was moored by an anchor and a stern line to the kedge of the *Ocean Spray*. The persons who were on board the latter vessel, or who were on shore, were unable to state the precise position. The testimony has, therefore, been chiefly directed to the establishment of the position of the *Ocean Spray*, and it clearly discloses as the fact, that the *Aulalia* and not the *Ocean Spray* was struck by the schooner, and proves that the former must have been, at least, as far out from the shore as the latter—she was probably a little further.

Hays, a seaman on board the *Aulalia*, testifies that she was more than thirty or forty yards from the channel. Cole, the master of the *Otsego*, and a witness for the libellant states that the *Ocean Spray* lay just inside the edge of the channel—"the bow was just at its edge, certainly not in it—her bow was about one hundred and fifty feet from the beach."

Hale, a seaman on the *Otsego*, testifies, that the *Ocean Spray* was seventy-five yards from the dry beach—she was not in the channel. "The fishing vessel was away inside the channel." This latter statement is contradicted by the libellant, the master of the *Aulalia*, who states that the *Ocean Spray* lay fifteen yards inside the channel, but that the *Aulalia* was two or three yards nearer to it than the *Ocean Spray*.

Miller, a seaman on the *Otsego*, testifies, that the *Ocean Spray*'s stem was about six or seven feet from the edge of the channel; that the distance from the edge of the channel to high water-mark was about twenty yards.

From these statements of the libellant's witnesses, it may be fairly concluded that the *Ocean Spray* and the *Aulalia* were moored at, or very near to the edge of the channel, if not actually in it. And this conclusion is corroborated by other circumstances.

Opinion of the Court—Hoffman, J.

[April,

The libellant's witnesses state that the Ocean Spray was high and dry at low tide. But this, though confidently asserted, seems hardly reconcilable with other facts in the case.

She drew six feet. If she was high and dry at low water, at high water she would have at most six feet—scarcely enough to float her. In that case she must have gone in at the very top of the tide, and yet the witnesses all state that she went in at least half an hour before high water.

The collision occurred at half tide. The boom of the Martha and Elizabeth struck her rigging. The Aulalia, said to have been even further in than the Spray, was struck by the schooner's bow; the latter drew four and a half feet. There must have been, therefore, at least that depth of water where the Spray lay at the time of collision. But if she was high and dry at low tide she would have been in only three feet of water at half tide, and the schooner, drawing four and a half feet, could not have reached either her or the Aulalia.

Again, she was hauled into the channel on the following morning about 9 or 9½ o'clock—high water occurred at about 12. She was hauled off, therefore, some hours at least before high water, and must at that time have been in at least six feet of water, otherwise she could not have been moved.

These considerations, and the testimony which has been cited, establish that the Ocean Spray and Aulalia were not upon the beach, out of the channel and removed from the ordinary track of vessels entering or leaving the harbor. They lay, I am satisfied, either partly in, or very close to the edge of the channel, and in a position where, without lights, they were exposed to the danger of collision.

The question thus presents itself: Was her position such as to excuse the Aulalia from complying with the requirements of the Act of Congress, Art. 9, of the regulations for preventing collisions on the water. Act of April 29, 1864, 13 vol. Stat. at large, p. 60, provides that "Fishing vessels and open boats when at anchor, or attached to their nets and stationary, shall exhibit a bright white light. Fishing vessels and open boats, however, shall not be prevented from using a flare-up, in addition, if considered expedient."

1870.]

Opinion of the Court—Hoffman, J.

The language of this regulation is positive and general. I know not by what authority a Court can in any case excuse a failure to obey it. It certainly cannot in a case like the present.

The "channel" referred to by the witnesses is, as all agree, not more than fifty yards wide at the point where the *Aulalia* was moored. The harbor is a frequent resort of coasting craft as a sort of refuge. In entering it these vessels are under no obligation or necessity to scrupulously observe the limits of the channel, even if it were at all times practicable to do so. They are usually of light draught, and are at liberty to go wherever the depth of water is sufficient. The *Aulalia* was moored, if not in, yet by her own admission, very near to the channel, and in water deep enough to be navigated by vessels of the schooner's draught of water, as is proved by the fact that a collision occurred. It is not easy to imagine a case where common prudence would more imperatively demand the exhibition of a light. If not precisely in the track which a vessel would pursue in the daytime, and under favorable circumstances, she was very near to it, and in a track which vessels of light draught entering the harbor at night take either involuntarily or voluntarily, as in the absence of any light to warn them of danger, they would be justified in doing.

The *Aulalia* being thus clearly in fault, the burden of proof is on her to show that, notwithstanding that fault, the accident would not have occurred except for the negligence of the colliding vessel.

The *Martha* and *Elizabeth* carried the lights required by the Act of Congress, but that fact, and the absence of lights on the part of the *Aulalia* "did not confer upon the former
" vessel any right to violate or disregard the rules of navigation, or to neglect any reasonable precaution to avoid
" a collision which the circumstances afforded the means
" and opportunity to adopt." (*Chamberlain v. Ward*, 21 How. 567.)

It is alleged that the schooner entered the harbor under too great a press of canvass. But the testimony clearly establishes that she carried only the usual and necessary

sail. Her speed, after rounding the point, is said to have been about three miles an hour.

It is urged that she should, when she discovered the Ocean Spray, have let go her anchor, but the experts who have been examined, deny that this would have been proper or expedient. The bottom of the strait was treacherous, the passage narrow, and she would probably not have been brought up by her anchor, until chain enough had been paid out to expose her to the risk of being driven on shore by the ebb tide. The vessel was not seen by the schooner, until she had approached within a hundred yards; had they exhibited lights, they would have been discovered at twice that distance. It does not lie in their mouths to urge that when the collision had been rendered imminent, if not inevitable, by their own fault, the other vessel did not, in the emergency, adopt the very best course, or that which subsequent reflection may suggest as most expedient. For even an error in judgment, under such circumstances, the master of the schooner is not responsible, provided he has exercised reasonable skill and diligence. The only point on which I have felt doubt, is whether the night was not sufficiently clear to permit the schooner to discover the vessels at anchor, as soon as she rounded the point, and at as great a distance as if they had carried lights.

The witnesses for the libellants declare that the moon was shining brightly, obscured only by a slight haze, and that it was sufficiently light to distinguish objects at a distance much greater than that from the point to the bight where the vessels were moored.

On the other hand, the master, mate, and seamen on board the schooner, swear that they kept a vigilant look-out and that the vessels were not seen until within 100 yards. If the witnesses on either side are deemed equally worthy of credit, the positive testimony that the vessels were not seen by a vigilant look-out, is entitled to more weight than the testimony of those who state that, in their opinion, they could or should have been seen.

There are some circumstances which corroborate the testimony of the respondent witnesses. The sinuous and dif-

1870. |

Syllabus.

ficult nature of the navigation, the narrowness of the channel, and the probability that, if well known to the master, that other vessels might be in his way, render it extremely improbable that in entering the harbor, he would not, for his own safety, have maintained a vigilant look-out. If he did so, he has done all that his duty required.

It is admitted that, as shown by the almanac, the moon, at the time of the collision, had passed the meridian, and was about five hours above the horizon. So far as I am able to judge, the effect of this must have been to cause Bodega Head to project to the eastward over the water, a shadow, in which vessels moored near its base would be enveloped. They would thus, to a vessel entering the harbor, be not only obscured by the shadow of the bluff, but with its dark side for a background, would be less easily discernible than if on a darker night, their hulls and spars had been brought into relief by a sky or horizon behind them.

If these views be just, it results that the libellants have not shown that the accident was due to the fault or negligence of the schooner; nor have they repelled the presumption that it was caused by their own neglect of a positive requirement of the law.

The libel must, therefore, be dismissed.

THE MARY BELL.

DISTRICT COURT, DISTRICT OF OREGON.

APRIL 18, 1870.

1. LIEN ON VESSEL FOR SUPPLIES.—The maritime law does not give a lien upon a vessel for supplies furnished at the home port.
2. HOME PORT OF VESSEL.—The residence of the owner is the home port of a vessel, although she may be enrolled elsewhere; the enrollment is only *prima facie* proof of the owner's residence, and therefore of the home port.
3. SUPPLIES FURNISHED VESSEL IN FOREIGN PORT.—To whom or what credit presumed to be given.

Opinion of the Court—Deady, J.[April,

4. SAME WHEN BILL MADE OUT AGAINST VESSEL AND OWNERS.—When a bill for supplies is made out against the vessel by name and the owners, it is evidence that credit was given to the vessel, and that the personal responsibility of the owners was not exclusively relied upon.

Before DEADY, District Judge.

Erasmus D. Shattuck, for Libellant.

J. W. Whalley, for Respondent.

DEADY, J. This suit was commenced by C. H. Myers, on February 9, 1870, to enforce a lien against the *Mary Bell*, for materials and work furnished to said boat at Portland, by the libellant as a plumber and fitter, between December 19 and January 26, previous. The work and materials are alleged to be of the value of \$576.25.

R. C. Smith, intervening for his interest as master and sole owner, appeared and answered the libel. The furnishing of the materials is not denied, but that any lien was given therefor upon the boat which can be enforced in this Court, is contested upon two grounds:

1. That the materials and work in question were furnished to the *Bell* at her home port, and therefore that the Admiralty law of the United States does not give a lien therefor.

2. That the owner was present with the boat when the work, etc., was furnished, and on this account the credit is presumed to have been given to such owner and not to the boat, and therefore the Admiralty gives no lien upon the boat.

The rule for the determination of the legal question involved in the first objection is as follows:

“By the maritime law of continental Europe, no distinction is made between the cases of domestic and foreign ships, nor between supplies furnished in a home port and abroad. But by the maritime law of England and this country, supplies furnished to a domestic vessel, in a home port, are presumed to be furnished on the personal credit of the owner or master, and do not create a lien which can be enforced in a Court of Admiralty by proceeding *in rem*.” (*Am.L. Reg.*, vol. 8, N. S. 371.)

1870.]

Opinion of the Court—Deady, J.

“Material-men, also, who furnish materials or supplies for a vessel in a foreign port, or in a port other than the port of the State where the vessel belongs, have a maritime lien on the vessel as a security for payment of the price of all such materials and supplies.” (The Belfast, 7 Wal. 643.)

* * * * “Such a lien does not arise in a contract for materials and supplies furnished to a vessel in a home port, and in such respect to such contracts it is competent for the States, under the decisions of this Court, to create such liens as their Legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement.” (Ibid. 645-6.)

The Bell was enrolled, under the Act of February 18, 1793, at the port of Astoria, Oregon, on January 10, 1870. The enrollment states that she was built at the Cascades, in Washington Territory, 1865, and that R. C. Smith was her owner and master; and she is styled and described therein as the “Mary Bell, of Portland,” but the residence of Smith is not stated, as it should have been. Smith was examined as a witness, and from his testimony it appears that he bought the boat in Portland in June, 1869, and took her to Ranier, on the Columbia River in Oregon, and rebuilt her, and then took her to Monticello, in Washington Territory, where he then and for a long time prior, resided and still resides, and where the boat now is. That about November 10, 1869, he brought the boat to Portland, for the purpose of having her machinery put into her, and her roof tinned, and the plumbing and fitting done for her. The port of Monticello, although within the collection district of Astoria, where the Bell was enrolled, is not within the State of Oregon, neither is it a port of entry or delivery established by law, but only a port or place on the Cowlitz River, near its junction with the Columbia River, where steamboats may, and do arrive from, and depart to ports or places upon the navigable waters of Oregon and Washington Territory.

Upon this state of facts, the first objection to the lien must fail. The only evidence that Portland was the home

port of the Bell is furnished by her enrollment. Waiving the consideration of the fact that this enrollment was made after four fifths of these materials had been furnished, at best it is only *prima facie* proof that the boat belongs at Portland, which may be overcome by evidence to the contrary. (*Am. L. Reg.* Aug. 1855, p. 622; *The Golden Gate*, 1 Newbury, 308.)

The evidence of the owner is conclusive upon this point. It shows that his residence is without the State, and at the port or place of Monticello, in Washington Territory. This being so, his boat belongs there in fact, although he may have procured her to be otherwise described in the enrollment. Whether a vessel is to be deemed foreign or domestic depends upon the residence of her owners, rather than the port of enrollment, but in the absence of evidence to the contrary, such residence will be presumed to be at the port of enrollment. For the purpose of this suit, and in the port of Portland, the Bell, being owned in Monticello, is to be considered a foreign vessel upon which the Admiralty law gives a lien for materials or work. The reason for this is well stated by Mr. Justice Wells, in *The Golden Gate*, *supra*, 311: "It is important to observe that the character of the vessel is only referred to for the purpose of ascertaining to whom and to what the credit was given; and in no other respect, so far as regards this case, is it important. If the owners reside in a foreign country, or in another State, the material-man is presumed to give credit to the boat and also to the owners, who live so remote, and who are beyond the jurisdiction of the Courts of the State. If the owners reside in the same State with the material-man, the latter can easily resort to them for payment, and readily enforce it in the Courts, therefore he may well be supposed to give credit to the owners alone. It is apparent, therefore, that the place of enrollment has nothing to do with the credit that is given; and has, therefore, nothing to do with the question of lien."

It is clear that the Mary Bell was owned at Monticello, and that was her home port or place. Therefore in the port of Portland, for the purpose of this suit, she is to be re-

1870.]

Opinion of the Court—Deady, J.

garded as a foreign vessel, subject to a lien by the admiralty law in favor of material-men.

As to the second objection, the rule of law is substantially stated by Chief Justice Taney, in his dissenting opinion in *Thomas et al. v. Osborne*, (19 How. 38) as follows: By the maritime law, repairs and supplies furnished at the request of the owner, are presumed to have been furnished upon his personal credit, unless the contrary appears. In the barque *Chusan* (2 Story, 468), Mr. Justice Story states the rule more comprehensively, and, in my judgment, more correctly:

“We all know, that, by the general principles of the maritime law, material-men have a three-fold remedy for supplies and materials furnished for a foreign ship. First, the ship itself; secondly, the owners; and thirdly, the master; and neither of these remedies is displaced, except by conclusive proof, that an exclusive credit has been, in fact given to one or more of the parties so liable, or to the ship itself.”

Here the master and owner are the same person, and it seems to me that in such a case, unless the contrary appears, the presumption ought to be that the party furnishing the supplies, dealt with him as master only, and therefore gave credit to the boat. This controversy does not arise between different creditors, as in *Pratt et al. v. Reed*, (19 How 359), but between the owners and the creditors. That was a case between mortgagees and persons claiming a lien for coals furnished the boat at the request of the owner and master, during a period of nearly two years. The Court ruled in favor of the mortgagees, upon the ground that there was no proof of the necessity of procuring the supplies in question, upon the credit of the vessel. There was very little ground for claiming a lien as against the mortgagees, although it was allowed in the Court below, but the opinion of Mr. Justice Nelson is an extreme one against the allowance of liens at all. (See *The Grapeshot*, 9 Wal. 137.) But as between the owner and material-men, when the supplies are furnished at the request of, or with the knowledge of the former, I do not think the question of whether they were necessary for the vessel, or whether they could have been procured otherwise than upon

her credit, ought to arise. The owner should be estopped under these circumstances, from asserting the falsity or impropriety of his own conduct, to the detriment of his creditors.

It only remains, then, to ascertain to whom or what the credit was given when these supplies were furnished.

The facts bearing upon this question, are these: The libellant undertook to furnish the material and labor at the solicitation of the engineer, Wilcox, who seems to have had the immediate charge of putting in the machinery, and fitting up the boat. From him, Myers learned that Smith was owner, and that the boat came from Monticello, where Smith lived. Libellant refused to do the work for Smith on the ground that he had once done some work for him on a steamboat, and was not paid for it. The engineer then assured libellant that he had or would have an interest in the boat, and that the boat was good for it. Upon this understanding, libellant undertook the job, and, as he testifies explicitly, not upon the credit of Smith or the engineer, but that of the boat. The engineer was not examined as a witness. It took about five weeks to complete the work, and once or twice—the first time soon after the commencement of the work—Smith came into Myers' shop, and obtained some of the material himself. At the beginning, Wilcox desired the clerk of libellant to charge the articles to the Mary Bell, and the clerk testifies that he did so; and, further, that about the time the boat was enrolled, and when the material, etc., amounted to \$400, he presented a bill to Smith for the amount, and he promised to call and pay a portion of it that afternoon. He also testifies that this bill was made out "to Mary Bell and owners," and that no objection was made to it by Smith on that account or otherwise.

On the stand, Smith stated that he expected the engineer to have procured these supplies at the Wallamet Iron Works, but admitted that the latter informed him at the time that he had employed the libellant. He also admitted that the bill was presented to him as stated by clerk, but could not remember how it was made out. He further admitted that the bill was left with him, and that he sup-

1870.]

Opinion of the Court—Deady, J.

posed he had it somewhere, but not with him. If this bill had not been made out to the Bell it would have been a strong circumstance against the conclusion that the credit was given to the boat. On the other hand, if it was so made out and presented to Smith and not objected to by him, it is pretty certain that not only the credit was given to the boat by the libellant, but that Smith so understood it, and assented to it. That the bill was so made out and presented, we have the uncontradicted and altogether probable testimony of the clerk. In addition to this, there is the presumption that if the bill was not made out against the boat, Smith would have produced it on the trial. It is the best evidence of the fact. He admits that he had it, and has made no effort to find it. Indeed, for aught that appears, he could lay his hand on it at any time. I think the evidence fully warrants the conclusion that the bill was made out and presented as the clerk states. Where an account for supplies and materials furnished was stated—"Barque Chusan and owners, bought of John and George Ring," it was held to be evidence that the credit was given to the vessel, and "to repel the notion that any mere personal responsibility of the owners was exclusively relied on or taken." (2 Story, 468.)

Add to this the other circumstances disclosed by the testimony, the refusal of Myers to trust Smith for the work, the explicit pledge of the boat for payment by the engineer, with the immediate knowledge and implied assent of Smith, and the reasonable conclusion is, that the libellant credited the boat exclusively, and also that Smith, by his agent the engineer, obtained the supplies with the direct understanding that the credit was given to the boat and not to themselves, and that the boat was not only tacitly but expressly pledged for the payment of the bill.

The bill is made out in currency, at eighty cents on the dollar; it will be changed to the rate of ninety cents, and a decree given that the libellant recover that amount, with costs and expenses of suit; and in case the same is not paid into Court within ten days herefrom, that execution issue therefor against the stipulators in the bond for the delivery of the boat to the claimant.

THE UNITED STATES *v.* EDWARD MATHOIT.

DISTRICT COURT, DISTRICT OF OREGON.

APRIL 20, 1870.

1. SEC. 44, ACT JULY 20, 1868, TO WHOM APPLICABLE.—Section 44, of the Act of July 20, 1868, (15 Stat. 142,) is applicable to any person who distills spirits (15 Stat. 150,) without having paid the special tax therefor, or giving bond, as required by law, whether such person has registered his still or given notice of his intention to engage in the business or not.
2. PROOF OF VIOLATION OF SAID LAW.—Where unstamped spirits are found in the premises of the defendant which contain the machinery and appliances for distilling spirits, this fact unexplained is sufficient to justify the jury in finding that such spirits were distilled on the premises, and since the last inspection of them by the gauger.
3. SAME.—Jury instructed that the evidence would justify them in finding that certain premises and still continued to be the property of the defendant, as before then stated by him in his act of registry and notice of intention to distill, and therefore were employed in the illegal distillation in question, with his consent and for his benefit.
4. PRESUMPTION OF OWNERSHIP.—When it is shown that certain property belongs to a particular person, the law presumes that the ownership remains unchanged, until the contrary appears.
5. GROUND FOR SETTING ASIDE VERDICT.—A correct verdict should never be set aside on account of supposed or actual error in the process or means by which it was obtained.

Before DEADY, District Judge.

THIS was an indictment under section 44 of the Act of July 20, 1868, (15 Stat. 142,) for carrying on the business of a distiller, without having paid the special tax therefor, or given bond, as required by law. On March 18, the case was tried upon the plea of not guilty, when the jury found the defendant guilty as charged in the indictment, and recommended him to the mercy of the Court. Afterwards, a motion for a new trial was argued by counsel, and taken under advisement.

J. C. Cartwright, for plaintiff.

David Logan, for defendant.

1870.]

Opinion of the Court—Deady, J.

DEADY, J. Section 44 of the Act of July 20, 1868, (15 Stat. 142,) provides:

“That any person who shall carry on the business of a distiller * * * without having paid the special tax as required by law, or who shall carry on the business of a distiller without having given bonds, as required by law, * * * shall, for every such offense be fined not less than \$1,000 nor more than \$5,000, and imprisoned not less than six months nor more than two years.”

On February 25, 1870, the grand jury of this district found an indictment against the defendant, Edward Mathoit, of Marion County, for violation of the above section. The indictment contains two counts. By the first, the defendant is accused of carrying on the business of a distiller, continuously between May 1, 1869, and February 14, 1870, without having paid the special tax therefor; and by the second with carrying on such business between the dates aforesaid, continuously, without having given the bond therefor, as required by law.

The defendant demurred to the indictment for that it did not state facts sufficient to constitute a crime. In support of the demurrer, counsel for the defendant argued that section 44 was not applicable to mere *illicit* distilling, but only where a party had registered his still and given notice of his intention to engage in the business, and then did so without paying the tax or giving the bond. Upon this construction of the act, and the fact, that the indictment did state that the defendant had registered and given notice of his intention to distil, it was claimed that the indictment was insufficient. The Court overruled the demurrer, and the defendant pleaded “Not guilty.”

Section 59 of the Act defines a distiller in these words:

“Every person who produces distilled spirits, or who brews, or who makes mash, wort, or wash fit for distillation or the production of spirits, or who by any process of vaporization separates alcoholic spirit from any fermented substance, or who making or keeping mash, wort or wash, has also in his possession or use a still, shall be regarded as a distiller.”

If a person who does any of these acts is to be regarded as a distiller, it is too plain for argument that for the time being he must be regarded as being engaged in the business of a distiller, and in violation of section 44, unless he has paid the special tax and given the bond. And this must be so whether he has registered and given notice of his intention to distill or not. The neglect to perform these mere preliminary precautionary conditions, does not secure immunity from the weightier matters of the law—the obligation to pay the tax and gave the bond. To support the charge of violating section 44, it is not necessary to aver or prove that the accused had registered his still, or given notice of his intention to distill, but only that he was engaged in the business of a distiller in any of the ways or by any of the means specified in the foregoing definition of a distiller, without having paid the special tax or given bond, as required by law.

The grounds of the motion for a new trial are substantially, that the verdict is contrary to law and the evidence, and not warranted by either, and that the Court misdirected the jury.

It appears from the evidence that the defendant and his father, quite an aged man, lived together on a farm in the immediate vicinity of Butteville, in the county and district aforesaid, upon which, among other things, they had planted and cultivated a vineyard. On the premises there was a small building, situate on the side of a hill. The lower room was partly underground, and opened out on the lower side of the hill, and at the date of the indictment and for nearly a year previous, was used as a wareroom for wines and spirits. The upper room was used as a distillery, and contained the still hereinafter mentioned, and some mash-tubs, and the like.

On December 5, 1868, the defendant (by form 26) registered the still in question, *to be used*, and set forth therein that it was set up near Butteville, and that Edward Mathoit was the owner of the same; that its cubic contents were fifteen gallons; and that it was to be used to make grape brandy; and on March 10, 1869, he gave notice (by form 27)

1870.]

Opinion of the Court—Deady, J.

of his intention to engage in the business of distilling brandy from apples and grapes in the building owned by himself, near the village of Butteville, with one copper still, twelve inches in diameter and twenty-eight inches high, containing 13.07 gallons, and also some tubs, containing in all 68.25 gallons of fermenting material—grapes and apple pumice; and that the premises on which the distillery were situate were owned by him. The defendant then paid the special tax and gave bond as a distiller for the remaining portion of the revenue year 1868, which expired on the last of April, 1869. No notice of change of ownership or intention to distill was given to the Assessor after that, nor did any one pay any special tax, or give any bond on account of or in connection with this still or apparatus thereafter. About February 23, the Collector seized the distillery and apparatus, and turned them over to the Marshal to be proceeded against as forfeited, in this Court. A judgment of condemnation has since been given against the property, no one appearing to claim it, together with 900 gallons of wine and 212 gallons of distilled spirits, seized on the premises at the same time. Among the packages of distilled spirits was one containing twenty-two wine gallons, which had been gauged and stamped for the defendant by Kilbourne, gauger of the district, in July, 1869, at which time the defendant told the gauger that he had no other spirits that needed stamping. The unstamped spirits were in five or six packages, and were 30 or 40 per cent. below proof, or about one third in volume of alcohol—proof spirits being one half in volume of alcohol.

On the argument of this motion, it was not contended that the proof was insufficient to justify the jury in coming to the conclusion that between the dates named in the indictment there had been spirits distilled on the premises, in violation of law. Upon this point the proof was ample and the jury could not have found otherwise than as they did. The simple fact of unstamped spirits being found on the premises, unexplained, was of itself sufficient to justify the verdict in this particular. But in addition to this there was the statement or admission of the defendant in July, 1869,

that he had then no other unstamped spirits on hand, and the direct testimony of the three uncontradicted witnesses—Hugg, Higgins and Shipley, who at different times in the months of November and December, saw the defendant's father engaged in the room with the still in such a manner and under such circumstances that it was manifest and apparent to the dullest comprehension, that he was engaged in distilling spirits.

But no witness testifies that he ever saw the defendant personally engaged in operating the still or attending to it, and upon this point the argument for a new trial rests.

It is claimed that the proof was not sufficient to connect the defendant with the illegal distillation, and that the Court erred and misled the jury in instructing them, that under the circumstances they were justified in finding that the premises and still continued to be the property of the defendant, as stated by him in his act of registry and notice of intention to distill, given March 10, 1869, and therefore were employed in the illegal distillation in question, with his consent and under his direction, and for his benefit exclusively, or in conjunction with his father.

To show the propriety of this instruction and the action of the jury under it, it will be necessary to briefly state the circumstances referred to in it.

As late as March 10, 1869, the defendant over his own signature claimed to the assessor that he was the sole owner of the premises and still. He paid the special tax, and gave the bond and operated it as his own until May 1, of that year. We find him on the premises with the gauger in July, 1869, acting as proprietor and procuring the inspection and stamping of the spirits he had distilled in March and April before. No evidence of any change of ownership is produced, nor of any change of circumstances of the party with reference to the property, or his location or employment, from which such change of ownership could fairly, or at all, be inferred. The defendant and his father continue to reside together, and the former is always found in or about the premises, or at work upon the farm. He employs Higgins to grub upon the farm. He sells Shipley the grape

1870.] •

Opinion of the Court—Deady, J.

cuttings, and is in the wine cellar with him. In short, he appears to be the active managing man of the place, while the old man remains in doors and runs the still. No notice of change of ownership of the still was given to the assessor by any one. True, the failure to give this notice, although a penalty is thereby incurred, should not preclude the defendant in this action from showing the fact of such change, and the jury from so finding, if the evidence is sufficient, and so the Court held and instructed the jury.

Besides these general considerations, there are some special circumstances disclosed by the testimony of the gauger and deputy assessor which tend to show that no change had taken place in the ownership of the property, and that the defendant was really engaged in operating the still.

Mellen, the Deputy Assessor for the division wherein the distillery was situated, testified that in pursuance of instructions from the assessor for the district, Mr. Frazer, he visited the distillery in question on February 14, 1870. First went into the dwelling house near by, where the defendant and his father were living together. After taking defendant's income return, he and defendant walked out to the distillery together. Went to the lower room or cellar, and tapped on some casks, and asked defendant what was in them. Defendant answered wine. Mellen replied that he had come to look after the distillery, and must examine the casks, and then did so, and found six casks to contain distilled spirits—apple or grape brandy—the same that was afterward seized and condemned as above stated. Deputy then said to defendant, thought he had got into a bad scrape, and had better go to Mr. Frazer's office in Portland, and see what could be done. Defendant said he couldn't go for a day or two. Mellen said better go, and locked up the room, and they both came down to the assessor's office at Portland, then or the next day. While at the distillery, defendant said that he distilled these spirits under the old law. At Portland, after it was ascertained that the law must take its course, Mellen said to defendant that he ought to have had the spirits stamped when Kilbourne was up at

Opinion of the Court—Deady, J.

. [April,

the distillery, and then the defendant replied that they had been distilled within a month or six weeks. Upon cross-examination, this witness became embarrassed, and was unable to give, with any certainty, the time and place of the last statement attributed to defendant, and altogether his manner and conduct upon this point was such as justly to subject his testimony to criticism. But I am not prepared to admit by any means, what counsel so vehemently urged upon the jury, that on this account, the witness ought not to be believed. And whether he should be or not, and how far he was discredited in this respect, the jury were the judges. Yet I will take the liberty of suggesting that when a revenue officer is charged with as important matter as this, he ought to observe correctly, and be able to come upon the stand and testify concerning it distinctly—giving time and place to all material circumstances, and particularly to conversations with the parties accused or interested.

Kilbourne testified that in July, 1869, he inspected and stamped the spirits on the premises for the defendant, which were evidently those distilled by him in March and April, 1869. Kilbourne did not inspect or stamp any more spirits on or at these premises until the seizure above mentioned. In the fall of 1869, perhaps the last of October, the defendant met Kilbourne in Portland, when the latter asked the former about his distillery. Defendant said he had not commenced distilling, and asked witness if there had been any change of the law, to which Kilbourne replied that he did not know, and that defendant had better inquire at the Assessor's office. Again, when defendant came to Portland with Mellen in February, Kilbourne met him and asked him if he was going to distill, or when he got through. Defendant answered that he had got through. K. replied: "I will have to go up then, soon" (meaning to distillery, to inspect and stamp spirits). Defendant said yes, and asked if law was same as last year. Kilbourne replied yes. Defendant then said he had got into trouble.

Thus, wherever we find the defendant, or with whomsoever conversing, he speaks and acts as if the distillery was his,

1870.]

Opinion of the Court—Deady, J.

and under his direction. The second conversation between him and Kilbourne, occurred the day after Mellen's visit to the distillery, when the defendant knew that he was in trouble and practically accused of the very crime of which he has been found guilty. It never occurred to him then, nor at any other time that we know of, until on this trial, to claim that he was not the owner and operator of this still. On the other hand, if the property had been sold or transferred to his father, or his father was engaged in running the distillery without the defendant's authority or consent, and not for his benefit, there is evidence of the fact, and the defendant should produce it. It is a presumption of law, upon which the jury were bound to act, that when the ownership of property is shown to be in a particular person, it continues to be so until the contrary appears.

The father was present at the trial, and was referred to by counsel for defendant, as the party who had really done this illegal distilling. If so, why not call him as a witness. Under the Act of Congress of February 25, 1868 (15 Stat. 37), he could have been compelled to testify as to the matter, and his evidence could not have been used against him in any prosecution against himself. The omission to do this is itself sufficient to justify the jury in presuming that no change of ownership or management had taken place, and that the defendant was really engaged in the business of distilling, and employing his father to personally attend to the process for him. Upon this question, Mellen's testimony may be laid aside, and still upon the facts the jury could not have come to any other conclusion than they did.

Nor was this question withdrawn from the jury by the instructions of the Court. For, while they were instructed that the ownership of the property was presumed to continue in the defendant until the contrary appeared, and that under the circumstances—the proof—they were justified in finding that the premises and still continued to be the property of the defendant, as stated by him to the assessor, they were also instructed that in subordination to the presumption of law just stated, they must determine that question for themselves.

But it is said that while the instruction did not profess to withdraw the question from the jury, as a matter of fact it was well calculated to, and possibly the jury may have mistaken the purport of it, and assumed without inquiry that the ownership of the property was in the defendant as a matter of law. I think this is a very improbable supposition, entirely too speculative to disturb the verdict of a jury upon. But if it were otherwise, as the verdict is undoubtedly correct, both as to law and evidence, it must stand. A correct verdict should never be set aside on account of error actual or supposed, in the process or means by which it has been obtained.

JOHN JOHNSON v. THE BARQUE CYANE.

DISTRICT COURT, DISTRICT OF CALIFORNIA,

APRIL 21, 1870.

1. SUNDAY—DUTY OF SEAMAN—RIGHTS OF MASTER.—A seaman has no right to refuse duty required of him on a Sunday, by our calendar, it appearing that at the port of Ounalaska, the day owing to a difference in the calendar, was not observed as a holiday; but the master had no right to expel him from the ship for such refusal.

Before HOFFMAN, District Judge.

Sullivan & Ellsworth, Proctors for Libellant.

Pixley & Harrison, Proctors for Claimant.

HOFFMAN, J. THE facts in this case are not disputed, and the question presented to the Court for decision is whether a seaman who had shipped for a voyage from this port to Ounalaska, in the Territory of Alaska and back, had a right to refuse to perform his ordinary duty, on the ground that such duty was required of him on a Sunday, notwithstanding that the day in question was not, by the custom and usage of the port of Ounalaska, where the vessel lay, observed as a Sunday or holiday. It is not disputed

1870.]

Opinion of the Court—Hoffman, J.

that according to our calendar the day was Sunday, but according to the calendar in use in the late Russian possessions on this continent, the day previous had been observed as a Sunday or holiday.

The duty required of the seaman was to assist in discharging the cargo.

The contract of the libellant was in the ordinary form of shipping articles. These articles contain no agreement for exemption from labor on the part of the crew on Sunday, or any other sacred day. But it is admitted that by usage and custom no labor is on that day exacted of seamen, except such as is necessary for the navigation, and care of the ship, or such as may be rendered necessary by extraordinary circumstances.

Admitting, therefore, that this usage enters into, and forms a part of the contract, it is nevertheless apparent that from its very nature it can only give to the seaman the right to exemption from duty, subject to the discretion of the master. It is for the latter to determine what work is necessary, and when the labor of the crew or of any member of it is required.

In cases of emergency, growing out of disaster or danger to the ship, the necessity for the labor of the crew may be apparent to all. But there are many occasions when the necessity or expediency of requiring their services may depend on circumstances known only to the master, and as to the force of which he alone can judge.

The right of a seaman to rest on Sunday from the labors of the week, cannot be more sacred than his right to rest during a portion of each twenty-four hours from the labors of the day; and yet the master's right to call all hands on deck, and, if in his judgment necessary, to deprive the crew of their watch below, cannot be questioned.

In all cases, obedience is the first duty of the seaman; and it is only when the command is clearly unlawful, or the duty exacted is plainly unreasonable and unnecessary, that a refusal to obey can be for a moment countenanced.

In the case of *Plary v. The Washington*, (Crabbe's R. p. 209,) Judge Hopkinson says:

“The libellant contends that he was not bound to work

on Sunday. There is no law for this position. The nature of the service requires that the men should do so, and they must not be allowed to set themselves up as judges, and refuse to do their duty on such excuses."

In the case at bar, the order of the master seems to have been reasonable and proper. By the usage of the port where the vessel lay, the day was a secular day, devoted to ordinary business and labor; and of this the seaman may be considered to have had notice when he entered into his contract. If by the law, or perhaps by the established usage of the port, labor had been prohibited on that day, he would have been entitled to the exemption. But certainly the master cannot be bound to accord to him all the privileges secured by the law or the usage of the port where the vessel is lying, and also all those allowed by the law and usage of the port from which she sailed. The contract for the seaman's service contemplates its performance in part at the port of Ounalaska, and as to that part it must be performed according to the law and usage there prevailing.

It did not distinctly appear at the hearing whether the previous day observed at Ounalaska as a holiday had been allowed to the seaman as a day of rest. It probably was; for the master would be unlikely to offend the sentiments of the inhabitants by a desecration of the day, and when all business and labor on shore were suspended, the discharge of the cargo by the crew would almost necessarily be interrupted.

The motives of the libellant in refusing to work are not shown. It does not appear what religion he professes, or even that he is a Christian. His refusal, therefore, cannot be attributed to scruples of conscience. He has chosen to stand on the purely legal ground that no work could be required of him on Sunday, except such as was clearly indispensable and necessary; and of this he constituted himself the judge.

My opinion is that the master had the right, under the circumstances, to require of him the performance of his duty. As the seaman, when the alternative was distinctly presented to him, chose to leave the vessel rather than go to work, he

1870. |

Syllabus.

must be regarded as having abandoned the service, and he can have no claim for wages which by his own act he was prevented from earning. But, at the same time, I consider that the master's command to the seaman to go to work or to go ashore, was virtually an expulsion from the ship as a penalty or punishment for his refusal to do duty. Had the vessel been in a foreign port, this would have been clearly unlawful. It might even have exposed the master to a criminal prosecution. Ounalaska, though within our own territory, is remote and not much frequented. The seaman's refusal may have arisen from an honest mistake as to his rights and duties. I cannot affirm that conscientious scruples may not also have influenced him. His previous conduct had been good. He made no objection to performing his duty on any other day.

The master could have compelled him to work by appropriate punishment, or the threat of it, or he might have hired a man in his place, the expense of which, together with such deductions from his wages as the nature of his fault justified, could have been charged to the seaman. I think he had no right to expel him from the vessel, certainly he had none to inflict that mode of punishment which is only allowable in extreme cases, and to impose in addition a forfeiture of the wages already earned.

I think, therefore, that the libellant is entitled to recover the wages due him at the time he left the vessel.

THE STEAMSHIP FIDELITER, LUGEBIL, (*Claimant and Appellant*) v. THE UNITED STATES, (*Libellant and Appellee*).

CIRCUIT COURT, DISTRICT OF OREGON,
MAY 6, 1870.

1. SEIZURE NECESSARY.—There must be an actual seizure before any judicial proceedings are instituted, to condemn a vessel for violation of the navigation laws of the United States.
2. SEIZURE MUST BE ALLEGED.—A seizure is a jurisdictional fact, and must

Opinion of the Court—Sawyer, J.

[May,

be alleged in a libel to condemn a vessel for violation of the navigation laws of the United States.

3. OBJECTION FOR WANT OF SEIZURE WHEN TAKEN.—If a seizure is not alleged in the libel, the objection may be taken for the first time in the Appellate Court.

Before SAWYER, Circuit Judge.

APPEAL.—This is a proceeding in Admiralty, to condemn the steamship *Fideliter*, for violation of the laws of the United States. There was no actual seizure of the vessel prior to the filing of the libel, and no seizure was alleged. No objection to the libel on this ground was taken in the District Court, and a decree was entered, condemning the vessel. An appeal having been taken, an objection was raised for the first time in the Circuit Court, that no seizure was alleged, and, consequently, that the libel failed to show jurisdiction.

Delos Lake and Milton Andros, for Appellant.

Joseph N. Dolph, for Appellee.

SAWYER, Circuit Judge. The first point made by the appellant, and which, if tenable, is fatal, is, that the District Court had no jurisdiction over the vessel, and that this Court has now no jurisdiction.

The ground of the objection is, that the jurisdiction of the District Courts of causes of "seizure under the laws of import, navigation and trade of the United States," under the provisions of section 9 of the Judiciary Act of 1789 (1 Stat. at L. 77), does not attach, unless the property judicially proceeded against, is seized prior to such proceeding, either in the district where the proceeding is had, or on the high-seas, and brought into such district. It is insisted, that an open visible seizure by an officer of the government, or other person authorized by law to seize, must precede the commencement of the judicial proceedings; and that such seizure prior to the filing of the libel, must be alleged therein, and proved on the trial.

Upon an examination of the authorities, I find this to be the law as settled by the decisions of the National Courts,

1870.]

Opinion of the Court—Sawyer, J.

including the Supreme Court of the United States. I shall only cite the authorities, without a restatement of the reasoning upon which the decisions rest. (The Ann, 9 Cranch, 289; The Silver Spring, 1 Sprague, 551; The Octavia, 1 Gall. 488; The Josefa Segunda, 10 Wheat. 312; *Keene v. United States*, 5 Cranch, 305; Conkling's Treatise, 254; Ben. Adm. 301; Betts' Adm. 68-9; *Gelsten v. Hoyt*, 3 Wheat. 318; Rule 22 Admiralty Rules Supreme Court U. S.)

That the objection may be taken in this Court for the first time is clear, from the same authorities. In the language of Sprague, J. in *The Silver Spring*, (1 Sprague 553): "This is a question of the existence of those facts, which will warrant the Court in proceeding to decree a forfeiture. In requiring a seizure by the collector, prior to the filing of the libel on the part of the government, the Legislature has made that fact a pre-requisite to a condemnation, and the plea in this case is like the plea of not guilty to an indictment, and puts in issue all material allegations of the information; and if, upon the trial, it does not appear that there was a seizure previously to the filing of the libel, the information is not sustained, and a forfeiture will not be decreed."

Upon a suggestion that the allegation of seizure is immaterial, and might be omitted, the learned Judge said: "But the information would be defective if the allegation were omitted." (Id. 554.) And this is manifestly so under the decision in *The Ann*, 9 Cranch, 289. The seizure is a material jurisdictional fact. In the latter case, the Court says: "It follows from this consideration, (that the place of seizure should decide as to the proper tribunal), that before judicial cognizance can attach upon a forfeiture *in rem*, under the statutes, there must be a seizure; for, until a seizure, it is impossible to ascertain what is the competent forum. And, if so, it must be a good subsisting seizure at the time when the libel or information is filed and allowed. If a seizure be completely and explicitly abandoned, and the property restored by the voluntary act of the party who made the seizure, all rights are gone. Although judicial jurisdiction, once attached, it is divested by the subsequent proceedings, and it can be revived only by a new seizure." (9 Cranch, 291.)

Syllabus.

[May,

The 22d Rule in Admiralty, prescribed by the Supreme Court, requiring the libel to state the *place of seizure*, is framed in strict accordance with the law, as thus settled by the Courts. In this case, the libel does not allege a seizure. It nowhere appears that there was a seizure, and the libel is, therefore, *substantially*, and not merely *technically*, defective, in failing to state a material jurisdictional fact, without which the Court cannot proceed to decree a forfeiture. (See also, as bearing upon this point, *Kempe's Lessee v. Kennedy*, 5 Cranch, 185; *Turner v. President &c.* 4 Dall. 8; *McCormick v. Sullivan*, 10 Wheat. 199; *Hodgson v. Bow-erbank*, 5 Cranch, 303; *Capron v. Van Noorden*, 2 Id. 126; *Sullivan v. Fulton Steamboat Co.*, 6 Wheat. 450; 8 Pet. 112; Id. 148.) It is conceded also, that there was, in fact, no seizure, so that an amendment would be of no avail.

It follows, therefore, that the decree of the District Court must be reversed, and the libel dismissed.

Decree accordingly

J. B. FITCH v. WILLIAM CORNELL, A. R. TUNSTALL, JONATHAN MOORE AND JACOB KLINE, JR.

CIRCUIT COURT, DISTRICT OF OREGON,
MAY 10 1870.

1. EJECTMENT. WHEN LANDLORD MAY BE MADE DEFENDANT.—A landlord has no right to apply to be made defendant in an action of ejectment in place of the tenant until the latter files his answer, stating “that he is in possession only as the tenant of another, naming him and his place of residence.” (Or. Code, 226.)
2. ANSWER SHOULD STATE FACTS, NOT EVIDENCE.—A defendant in ejectment should state in his answer the nature and duration of the estate he claims in the premises, if any, but not the evidence of it. (Or. Code, 226–7.)
3. EXHIBIT, NO PART OF A PLEADING.—An exhibit is no part of a pleading in an action at law; a record or instrument should be stated in a pleading either according to its tenor or legal effect.
4. DIVORCE, DISPOSITION OF PROPERTY OF THE PARTIES.—The Oregon Act of January 17, 1854, relating to marriage and divorce, which gave the Court

1870.]

Opinion of the Court--Dedy, J.

granting a divorce power to "make such a disposition of the property of the parties" as might appear "just and equitable" under the circumstances of the case, and to "make such disposition of and provision for the children as shall appear most expedient," did not authorize such Court to give the property of either parent to the children, except during their minority, and as a means of providing for their nurture and education during such minority.

5. **MINOR DEFENDANTS, HOW JURISDICTION OF ACQUIRED.**—A general guardian cannot voluntarily appear for minor defendants, but they must be served with process, and a guardian *ad litem* appointed for them, when brought into Court.
6. **JUDGMENT IN EJECTMENT WHEN NO BAR TO ANOTHER ACTION.**—If a verdict for the defendant in an action of ejectment, only states that the defendant is entitled to the possession of the premises, a judgment therein is not necessarily a bar to another action between the same parties for the same property. (Or. Code, 227.)
7. **MESNE PROFITS.—SET-OFF.**—A plea of set-off for permanent improvements made upon the premises in an action for mesne profits, is not sufficient, unless it allege that such improvements were made by the defendant, or those under whom he claims while holding under color of title, adversely to the claim of the plaintiff and in good faith. (Or. Code, 227.)

Before DEADY, District Judge.

Joseph N. Dolph and Walter W. Thayer, for plaintiff.

Erasmus D. Shattuck, for defendants.

DEADY, J. THIS action was commenced April 16, 1869, to recover the possession of lots 3, 4, 5 and 6, in block 111, in the city Portland, against George W. Durand, then in the actual possession of the premises.

The complaint alleges that the plaintiff is a citizen of the State of California, and said Durand is a citizen and resident of Oregon; that plaintiff is the owner in fee-simple of the property sued for, and entitled to the immediate possession thereof; and that the defendant Durand is wrongfully in possession of the same and withholds such possession, to the damage of plaintiff \$1,000.

Among the papers in the case is one purporting to be the answer of Durand, and signed by his attorneys, and verified by him on April 27, 1869. The paper is attached to the separate applications of William Cornell and others to be made defendants in place of Durand, the outer one of which is marked "Filed May 3, 1869." I presume it was assumed

by the attorney, that this answer being attached to these applications, it became a part of them, and was filed with them. But this is a mistake. It has no connection with them, and ought not to have been attached to them. It comes from another source, and should have been filed before the applications were entitled to be heard. A landlord has no right to apply to be substituted as defendant in place of the party who is in actual possession and sued, until the latter by his answer made and filed in Court, declares "that he is in possession only as the tenant of another, naming him, and his place of residence." (Or. Code, 226.) Such slovenly and irregular practices touching matters of this kind are often in after times the cause of innocent parties being involved in unnecessary and expensive litigation, and therefore ought not to be tolerated by the Courts. For this reason I call attention to it in this instance. Having done so, I will assume for the purposes of this case, that it was in *fact* filed, although not so endorsed, by being lodged in the Clerk's office, and placed by the Clerk among the papers of the case, and that therefore Cornell and others had a legal right to be made defendants in place of Durand, the party in possession.

The answer of Durand admits that he is in possession of the premises, but alleges that he holds such possession as the tenant of William Cornell, S. M. Tunstall and Mary Jane, his wife, Jonathan Moore and Jacob Cline, residents of Multnomah County, in the district aforesaid.

On May 5, 1869, William Cornell, in pursuance of the order of the Court making himself and the others aforesaid defendants, in place of Durand, filed an answer to the complaint, which contains the following pleas or defenses:

1. A specific denial of each material allegation of the complaint, except the citizenship of the parties and the possession of the defendants.

2. That the defendant is the owner in fee of an undivided one fourth of the premises, for which he defends. This plea, instead of stopping here, proceeds at length to state the *evidence* which the defendant claims proves the fact that he is the owner of such undivided interest in the premises.

1870.]

Opinion of the Court—Deady, J.

This part of the plea will be omitted here and stated in the evidence.

3. That the plaintiff ought not to have and maintain this action, because in an action heretofore brought by one Jacob Cline to recover the possession of the same premises against John Hulery, in the Circuit Court for the County of Multnomah, and State of Oregon, in which one Mary Cline, guardian for her minor children Antha, Isabella, Mary Jane and Jacob Cline, was admitted by the order of said Court as a defendant in place of said Hulery, as guardian aforesaid, it was on December 5, 1863, by the judgment of said Court determined that said Mary Cline, as guardian aforesaid, was entitled to the possession of said premises, and that Jacob Cline take nothing by his said action; and that afterwards the said Jacob Cline appealed from the judgment of the said Circuit Court to the Supreme Court of the State aforesaid, and said Supreme Court, on hearing and consideration of said appeal gave judgment on September — 1864, affirming the judgment of the said Circuit Court, which still remains in full force and effect; and that said judgments of said Circuit and Supreme Courts are conclusive as to the estate in said premises, and to the right to the possession thereof upon said Cline and all persons claiming under him since the commencement of said action, and that the only right or title held by the plaintiff herein, is derived from Cline since said action was commenced.

4. That the defendant and those under whom he claims since November 26, 1862, have made permanent improvements upon the premises, of the value of \$1,000, which sum he offers to set-off against any sum that the plaintiff herein may be found entitled to as damages on account of the defendant's occupation of the premises.

The other three defendants filed separate and similar answers, Mary Cline appearing and answering for her ward, Jacob Cline aforesaid. On May 6, the plaintiff filed separate replications to the answers of the defendants. These do not contain, as they should, separate replies to the separate defenses in said answers, of title in the defendants, and a former adjudication of the right to the possession of the

premises. As to the plea of title, they deny that the defendants are each the owners of an undivided fourth of the premises, or of any estate or interest therein, and then proceed to reply to the evidence of defendants' alleged title, as set forth in the plea of title in the answer—either denying the facts stated, or the legal conclusions sought to be drawn therefrom. The proper reply to this part of these pleas would have been a motion to strike out for redundancy. As to the pleas of former adjudication, the replications admit that an action was brought in the Circuit Court aforesaid, by Jacob Cline against John Hulery, to recover possession of the premises in the complaint mentioned, as stated in said pleas, but deny that it was adjudged therein that said Cline take nothing by said action, or that the same was brought for the identical causes as this, or that "all the matters involved in this action were adjudged or finally determined" therein; "and alleges that a true copy of the judgment in said action is hereto attached and marked A;" and denies that said judgment of the Circuit and Supreme Court aforesaid, are conclusive as to the estate in said property, or as to the right to the possession thereof upon said Jacob Cline, or those claiming under him as alleged in said pleas.

As to the so-called exhibit A, attached to the replications, it cannot be regarded as a part of them. There is no such thing as an exhibit in pleadings, in an action at law. A record or instrument must be stated in a pleading according to its legal effect, or according to the tenor thereof, and its legal operations referred to the Court. (Gould's Plead. 156-60.) The plaintiff by his replication, denies that the action mentioned in this record or so-called exhibit A, was brought for the same causes of action as this, and also denies that the legal effect claimed for such record by the defendants in their answers. This is sufficient, so far as the pleadings are concerned. The burden of proof is upon the defendants, to show the existence of such a record, and that they have correctly stated its legal effect.

From the evidence it appears:

I. That in 1836, in the State of Illinois, Jacob Cline and

1870.]

Opinion of the Court—Deady, J.

Mary Cline were intermarried, and that they continued to live together as husband and wife, until 1862, and that since 1844, they have resided in Multnomah County, Oregon.

II. That on September 26, 1862, Mary Cline commenced a suit against Jacob Cline, her husband, for a divorce from the bonds of matrimony, on account of adultery and harsh and cruel treatment, and for the custody and guardianship of four minor children of said marriage, and for a division of Jacob's property, and an allotment of so much thereof to said Mary, as might be just and equitable under the circumstances; and that Mary was the owner in her own right of one half of the donation claim of 640 acres of said Jacob and Mary, of the value of \$2,500; and that said Jacob was the owner of the other half of said donation claim, together with other real property situate in the city of Portland, of the value of \$18,000, and of personal property of the value of \$5,000, all of which has been acquired since the marriage aforesaid, except \$1,500 which Jacob possessed at that time; and that there were then living seven children, the issue of said marriage, four of whom were minors between the ages of nineteen and seven years.

III. That on November 26, 1862, said Circuit Court by its decree then given, in said suit for divorce, etc., adjudged and provided, that the parties thereto be divorced from the bonds of matrimony; and that said Mary "have the custody and guardianship of the four minor children of the parties mentioned in the complaint, to wit: Antha, Isabella, Mary Jane and Jacob, and the care and control of their estate during their minority respectively;" and that the defendant's half of the donation claim aforesaid, and lots five and six in block seven, in the city of Portland, then owned by Jacob, be given to and "vested in said Mary, to have and to hold to her own use during her natural life," which real property, according to the statements of said parties in their respective pleadings, was then of about the value of \$5,200; and also that certain furniture owned by said Jacob, of the value, according to the statements aforesaid, of about \$500, "be given to, and transferred to said Mary, to have and to hold the same to her own use;" and that said Jacob pay to

said Mary the sum of \$1,500 in money out of the remainder of said property in two payments within the period of six months thereafter; and also “all the right, title and interest of said Jacob in and to lots three, four, five and six, in block 111 in the city of Portland, be and the same is divested out of the said Jacob, and the same is hereby vested in the four minor children of the parties, to wit: Antha, Isabella, Mary Jane and Jacob, as tenants in common, to have and to hold the same with the appurtenances to them and their heirs forever, and the same Jacob is hereby ordered and required to deliver over to the said minors or their guardian, the possession of said property, and said guardian is hereby required to use and apply the issues, rents, and profits of said estate, to the maintenance and education of said minors respectively, according to their interest during their minority, which last mentioned property is the same for the possession of which this action is brought, and which at the date of said decree, according to the statements of the parties aforesaid, was of the value of about \$3,600; and further, that the remaining property and pecuniary rights of Jacob not disposed of by said decree, remain to him as if the same had not been made.

IV. That Jacob paid said sum of \$1,500 to said Mary, and also the costs of said suit; and that on November 25, 1863, Jacob gave notice of an appeal from the decree aforesaid to the Supreme Court of the State of Oregon, and that on September 21, 1864, said Supreme Court, on motion of respondent, dismissed said appeal, without hearing the cause upon its merits, because so far as appears, no transcript thereof was filed by appellant in said Court.

V. That on October 8, 1863, said Jacob Cline brought an action in the Circuit Court aforesaid against John Hulery, to recover possession of the lot in controversy, alleging in his complaint therein, that he was the owner in fee and entitled to the possession of the premises, and that the said Hulery was wrongfully in the possession thereof. On the same day Hulery was duly served with process requiring him to appear and answer the complaint by November 9, which he failed to do. On November 14, Cline moved for

1870.]

Opinion of the Court—Deady, J.

a judgment against Hulery; and on the same day Mary Cline moved for leave to appear and answer as the landlord of Hulery. Accompanying this latter motion, was the affidavit of Mary to the effect that the property in question belonged to her children," and as their guardian, she was entitled to the possession of the same; and that she had rented it to Hulery, and had no notice of the pendency of the action until the day before, whereupon said Circuit Court denied the motion of Jacob and allowed the motion of Mary. On November 16, Mary filed an answer to the complaint of Jacob, wherein she denies that he is the owner of the premises and entitled to the possession thereof, and pleads, according to the tenor thereof, so much of the decree in the suit of divorce above mentioned, as relates to the premises in controversy, and that as guardian of the minor children aforesaid, she had rented said property to Hulery, who was then in the possession of the same as her tenant; and that she was applying the rents and profits of said property to the support of said children, in pursuance of said decree.

VI. That the action aforesaid was tried by the said Circuit Court, without the intervention of a jury, and on December 4, the said Court found, as a conclusion of fact, that "Mary Cline is the guardian of the minor children named in the answer, and as such, was at the time of the commencement of this suit, and is by her tenant, the defendant Hulery, in possession of the premises described in the complaint;" and "that the decree, an *extract* of which is set out in the answer, remains unreversed, and at the date of the answer not appealed;" and that said Court also found "as a conclusion of law from these facts, that the defendant Mary Cline, as guardian, etc., the defendant John Hulery as her tenant, is entitled to the possession of said premises." And afterwards, on December 5, the Court aforesaid gave judgment in said action and upon said findings, as follows:

"This cause being submitted to the Court upon the pleadings and an agreed statement of facts, the Court finds that the defendant Mary Cline, as guardian, and the defendant Hulery as her tenant, are entitled to the possession of the premises described in the complaint, and it is ordered and

Opinion of the Court—Deady, J.

[May,

adjudged by the Court that the defendant Mary Cline, as guardian, and defendant John Hulery as her tenant, do have and hold the possession of said premises, and that they recover of and from the plaintiff their costs and disbursements, to be taxed." And that afterwards Jacob Cline took an appeal from said judgment of said Circuit Court to the Supreme Court of the State of Oregon, upon the hearing and consideration of which, it was determined by said Supreme Court, on September 27, 1864, that there was no error in the record of the proceedings in the Court below, and that its judgment "be in all things affirmed."

VII. That in the month of August, 1862, Jacob Cline became and was the owner in fee simple of the premises, and that soon after the decree of divorce aforesaid, Mary Cline, with the knowledge of Jacob, received the rent from the tenant in possession of the same, and after said tenant left the premises she rented them to Hulery aforesaid, and that the use and occupation of the same since November, 1862, has been worth not less than \$45 per month, or \$520 per annum; and that on December 9, 1868, Jacob Cline and Sarah Ellen, his wife, executed a conveyance of the premises to the plaintiff herein; and that Isabella aforesaid intermarried with one James Campbell in the month of December, 1867, and that afterwards and before December, 1868, she and her said husband duly executed a conveyance of an undivided one fourth in the premises to the defendant Moore; and that Antha aforesaid intermarried with one Peter Cline prior to December, 1868, and afterwards and prior to the last mentioned date, she and her said husband duly executed a conveyance of an undivided one fourth interest in the premises to the defendant, Cornell; and that Mary Jane aforesaid, after the decree of divorce aforesaid, and before the commencement of this action, intermarried with one S. M. Tunstall, one of the defendants herein; and that said Antha, Isabella and Mary Jane had each arrived at the age of majority before the commencement of the action, and that Jacob Cline junior is now aged fifteen years and six months.

Upon this statement of the case, two principal questions arise, and were argued by counsel.

1870.]

Opinion of the Court—Deady, J.

1. Had the Circuit Court of Multnomah County jurisdiction and power in the suit for divorce between Mary and Jacob Cline, to take the property of the latter and vest it in his children, or any of them? and,

2. Is the plaintiff barred from maintaining this action to recover the possession of the premises by reason of the judgment of said Circuit Court, in the action of Jacob Cline against Hulery aforesaid.

The answer to the first question depends upon the construction to be given to the statute then in force, entitled—“An Act relating to marriage and divorce,” passed Jan. 17, 1854, and which took effect on the first of May following. The second and last chapter of the Act is entitled—“Divorce and Alimony.” After declaring the causes for which a divorce might be granted, and in what Court the proceedings should be had, and the mode of them, the Act provides as follows:

“SEC. 7. The Court in granting a divorce, shall make such disposition of, and provision for the children, as shall appear most expedient under all the circumstances, and most for the present comfort and future well being of such children.” * * * *

“SEC. 8. In granting a divorce, the Court shall also make such a disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and the burdens imposed upon it, for the benefit of children.” * * *

“SEC. 10. When the marriage shall be dissolved by the husband being sentenced to imprisonment, and when a divorce shall be ordered for the cause of adultery committed by the husband, the wife shall be entitled to her dower in his lands in the same manner as if he were dead; but she shall not be entitled to dower in any other case of divorce.” (Or. Stat. 1855, p. 540.)

This Act remained in force until June 1, 1863, when it was superseded by Title VII, of Chapter V of the Civil Code, passed October 11, 1862. (Or. Code, 269.) If the

Act has received a settled construction in the Courts of Oregon, it is the duty of this Court to follow such construction. But I do not think it can be said to have received such a construction. It contained no provision for an appeal from the inferior Courts in which the original jurisdiction was vested, to the Supreme Court, and therefore its provisions never came before the latter Court, and were never directly considered or expounded by it. During the existence of the Act, the decisions of the District Courts, until the State organization went into operation in 1859, and thereafter the Circuit Courts, were final in each case. The defendants have produced five decrees of these Courts in support of the position that the Act authorized the Court to give the real property of the parties, or either of them, to the children.

In *Horner v. Horner*, on September 5, 1855, there was a decree of divorce on the complaint of the wife. The parties were in possession of a donation claim of 640 acres, under the Act of Congress, each being entitled to one half thereof in his or her own right. The Court (Olney, Judge) gave the wife her half of the land, and gave the husband's half to two minor children of the parties.

In *Shively v. Shively*, on June 15, 1857, there was a divorce granted on the complaint of the wife. The parties were in possession of a donation claim, and the Court (Olney, Judge) gave the husband his half of the land, and gave the wife's half to the minor children of the marriage.

In *Fozette v. Fozette*, on August 15, 1859, there was a divorce granted on the complaint of the wife, and the parties appear to have been in possession of a donation claim of 640 acres. The Court (Wait, Judge), divided the wife's half of the claim between herself and two minor children, but made no disposition of the husband's half.

In *Soverns v. Soverns*, on November 29, 1860, there was a divorce granted on complaint of the wife. The Court (Wait, Judge), divided the land of the husband (160 acres) between the wife and one minor child of the marriage.

In *Stone v. Stone*, on August 6, 1859, a divorce was granted on the complaint of the wife. The parties were in

1870.]

Opinion of the Court—Deady, J.

possession of a donation claim of 640 acres. The Court (Wait, Judge) gave the husband his half of the claim, and divided the wife's half between herself and one infant child of the marriage.

No other instances of the exercise of this power have been shown, and these are confined to one judicial district of the State, the same in which *Cline v. Cline* was decided. In the other judicial districts, no such construction appears ever to have been given to the act, and only in these comparatively few instances in a period of nine years, in that one. If this state of things is any evidence of a settled construction of the statute by the Courts of Oregon, it is against the one claimed by the defendant.

I conclude, then, that the question is unsettled, and that this Court must construe the act for itself.

The primary object of the statute was to authorize and provide for the dissolution of the marriage relation in certain cases when, on account of the neglect, misconduct or unfitness of one of the parties to it, the other, in the judgment of the Legislative Assembly, ought no longer to be bound by it. But when a divorce is granted, the parties are not restored to their original condition, and it becomes necessary to provide for and adjust the rights of the parties in and to the property of each other, and to make disposition of and provide for the future custody and maintenance of the minor children of the marriage. This power is merely incidental to that of granting the divorce, and therefore ought not to be extended or applied farther than is necessary and convenient to provide for the altered circumstances of the parties directly consequent upon their judicial separation. Unless a divorce is granted, the Court has no power over the property or children of the parties. The power to dispose of the property of the parties is not an unqualified one. Certainly it would not be contended that the Legislature intended to give the Court power in its discretion to dispose of the property by giving it to the parents of the parties, or to their cousins or strangers, or to charitable uses; nor, it seems to me, could the rights of creditors be prejudiced or excluded by such disposition.

In making this disposition, the Court is required by the act to have “regard to the respective merits of the parties;” that is, the parties whose property is to be disposed of, are the parties whose “respective merits” are to be regarded by the Court in making such disposition. Now, the necessary inference from this clause is, that in disposing of the property the Court is confined to the parties whose “merits” it is required to consider in making it. These parties are the parties to the suit—the husband and wife—and not other persons, whether strangers or relations, lineal or collateral. Again, the Court in disposing of the property of the parties, is to have regard “to the condition in which they”—the parties to the suit—“will be left by such divorce;” and also “to the party”—one of the parties to the suit—“through whom the property was acquired,” and “to the burdens imposed upon it”—the property divided between the parties—“for the benefit of children.”

From these considerations I conclude, that section 8, which authorizes the Court granting a divorce “to make such disposition of the property of the parties, as shall appear just and equitable, cannot nor ought not to be construed as giving power to such Court to dispose of such property by giving it to third persons—even if they were the children of such parties. The only disposition of the property which this section authorizes the Court to make, is one between the parties to the suit. Whether its power in this respect is absolute or not, is a serious question, but for the purposes of this action it may be admitted to be unlimited.

But it is claimed that, under the clause already quoted from section 7 of the act, the Circuit Court had power to give the premises in controversy to the minor children of Cline. This clause provides that, “the Court in granting a divorce, shall make such disposition and provision for the children as shall appear expedient under the circumstances, and most for the present comfort and future well-being of such children.” This power to dispose of and make provision for children, is given to the Court by the statute only as an incident to the power to grant a divorce. There-

1870.]

Opinion of the Court—Dedy, J.

fore, as has been said of the power to dispose of the property of the parties, it ought not to be extended or applied farther than is necessary and convenient for the altered circumstances of the parties directly consequent upon their judicial separation.

During the marriage, the custody of the children belongs to the parents jointly, subject to the ultimate authority of the father as the head of the family, but upon a divorce being granted, it is or may be impossible that this joint custody can be continued. To meet this emergency, the Court is authorized to dispose of the children. But it would not be authorized to dispose of them by giving them to a third person, whom it regarded as better qualified than either of the parents. The act was not made to enable the Circuit Court to interfere with the relation of parent and child only as an incident of the power of granting a divorce, and then only as far as might become necessary on that account. The joint custody of the parents being determined or rendered impracticable by the divorce, the only power of the Court in the premises is to provide for the emergency by giving the children to one or the other of them.

This word children must be construed to mean minor children. If the children of the parents are of age when the divorce is granted, the Court has no power to dispose of them or provide for them. The reason is, they are no longer in the custody or under the control of their parents, nor are the latter bound to maintain them, except under peculiar circumstances arising from poverty and sickness.

So with the power to make "provisions for the children" of divorced parties, it must be exercised in subordination to the proposition that the Court is only authorized to make provision for their maintenance, so far as the condition and circumstances of their parents warrant and require, and their divorce renders it necessary. Of course under no circumstances, would it be authorized to make provision out of the property of the parties or either of them, for the maintenance of children who are of age, and whom the parents are therefore not bound to support.

Whether, under the authority to make provision for the

minor children of Jacob Cline, the Court had authority to take the premises in controversy, and give them to such children outright, during their minority, or to their mother in trust for them, may be a question. The act, in some particulars, seems rather to contemplate that the provision shall be made in the usual way, by giving the parent to whom the children are confided, a larger portion of property, to enable him or her to meet the burden of their maintenance, or by imposing upon the property of the other a charge sufficient for that purpose. But the act, so far as it gives the Court jurisdiction, does so unqualifiedly. There is no limit or restraint as to the choice of means by which the Court shall make this provision, and I am inclined to the opinion that the Court, if it appeared “expedient under all the circumstances,” had authority to vest the property in the children or their mother, for their use, for that purpose. But as Jacob Cline was not bound to support his children after they became of age, the Court had no authority to make any provision out of his property for their maintenance, to extend beyond the time when they would become obliged to support themselves.

The Circuit Court, although authorized to divorce Mary from Jacob, and as between themselves to make a just and equitable disposition or division of their property, and to dispose of and provide for the maintenance of their minor children, had no power to anticipate Jacob’s demise, and to make a will for him devising this property to these children—“to have and to hold the same with the appurtenances to them and their heirs forever.”

Upon this point it seems to me there is no room for difference of opinion. The decision of the Circuit Court given in the suit for divorce, so far as it provides that the premises in controversy should be held by, or for the use of the minor children of Jacob, beyond the time when they should become of age respectively, is simply void. Upon any construction that I am able to give the act, the Legislative Assembly did not intend that a father’s property should be arbitrarily taken from him and given to his adult child, or what amounts to the same thing, to his minor child to hold

1870.]

Opinion of the Court—Deady, J.

and possess after he becomes of age, because forsooth, in a civil suit for divorce, he was adjudged to have broken his marriage vows, or neglected the duties which they imposed upon him. The two things have no necessary connection; and if the act expressly provided for its being done, it would be so far void. Such a disposition of property amounts to a forfeiture without due process of law, and is beyond the power of the Legislative Assembly to authorize.

The consequence of vesting the arbitrary discretion in any Court to take a parent's land and give it to his or her child, because in the judgment of the Court it is expedient or best for the child, is singularly illustrated in the above cited case of *Stone v. Stone*. There the divorce was granted upon the complaint of the wife for the fault of the husband: The parties owned 320 acres of land apiece, each in their own right. The Court, in legal effect, divested each of any right to or interest in the land of the other. As the mother was the innocent party, and the only issue of the marriage was an infant female child, the Court very properly gave the custody of the mother, but instead of giving the mother a portion of the father's land, to assist her in bringing up the child, or charging it with the payment of some sum of money for that purpose, the Court arbitrarily took one half of the mother's land, and gave it to the child forever.

I next proceed to consider the second question as to whether the plaintiff is barred from maintaining this action on account of the previous adjudication in the case of *Cline v. Hulery*. The plaintiff Fitch claims under Jacob Cline, and of course is bound by that adjudication as far as Cline, his grantor is. They are privies in estate. But the judgment in *Cline v. Hulery* cannot operate as an estoppel against Cline or his grantee in this action, unless it also binds the defendants. Estoppels, to be binding upon either party, must be mutual. (*Deery v. Cray*, 5 Wal. 803.) In this case there is no such mutuality. The defendants now before the Court were neither parties nor privies to the judgment in the action of *Cline v. Hulery*. The minor children of Jacob and Mary Cline were not served with process in that action, and the Court never acquired jurisdiction of them. Con-

Opinion of the Court—Deady, J.

[May,

sent will not give jurisdiction as to minors, but the proceeding must be *in invitum*. No guardian can voluntarily appear for a minor, but he must be served with process and thereby brought into Court, and a guardian *ad litem* then and there appointed for him. (Or. Code, 146, 151.) It seems that Mary Cline assumed that she was the landlord of Hulery, the person in possession, when in fact, upon her own showing, the minor children were such landlords, and she was in some sort their guardian or trustee. It is not even clear there was *any* person properly before the Court in that action as defendant, except Hulery. True, Mary Cline was admitted to defend the action as the landlord of Hulery, in opposition to the motion of plaintiff for judgment against H. for want of an answer. But it is not perceived on what ground the Court made this order, as the law authorizing the landlord to be made defendant in the place of the tenant, in an action of ejectment, does so only upon the condition or contingency that the tenant against whom the action is brought shall first answer and plead, "that he is in possession only as the tenant of another, naming him and his place of residence." "Thereupon, the landlord, if he apply therefor, shall be made defendant in place of the tenant, and the action shall proceed in all respects as if originally commenced against him." But Hulery made no answer, of any kind, and the Court allowed Mary Cline to volunteer to become a defendant, upon her statement, instead of Hulery's answer, that she was his landlord.

But, for the purposes of this action, it may be admitted that the Court had the power to admit Mary Cline to become a defendant, as it did, or that the plaintiff in the action accepted her as such defendant, by proceeding thereafter with the action against her, and still the judgment therein would not have been given between the parties to this action, or those under whom they claim, and therefore the plaintiff Fitch is not estopped by it. The minor children of Cline or their grantees, defendants in this action, do not claim under Mary but under Jacob Cline, and therefore they are not estopped by a judgment in an action between Mary and Jacob; and if they are not estopped, then neither is Jacob or his subsequent grantee.

1870.]

Opinion of the Court—Dedy, J.

Again, it may be assumed for the time being that in *Cline v. Hulery*, the minor children aforesaid became parties to the action by reason of their mother's being admitted as their guardian to become defendant as landlord, and in place of Hulery, and therefore that the judgment given therein is mutually binding upon said children and Cline, and estops either of them or those claiming under them, from asserting or claiming anything to the contrary, and still the plaintiff is not estopped by such judgment from maintaining that he is the owner of the premises in controversy and entitled to the possession thereof.

The action of *Cline v. Hulery* was brought under section 13 of the Civil Code, which provides, that:

“Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law.” And also, that the action must be brought against the person in actual possession, or if no one be in such possession, then against the person acting as owner thereof. (Or. Code, 226.)

At common law ejectment was only a possessory action, and a judgment therein did not determine the estate or interest of the parties in the property, and owing to the special fictions which were a part of the action, such judgment, in effect, did not conclusively determine even the right to the possession. But in most of the United States it has long since been provided, that a judgment in an action of ejectment, as between the parties, shall be conclusive as to all the questions actually and necessarily included therein or necessary to such determination. Still the defendant was permitted to plead the general denial or “Not Guilty,” and the jury to find a general verdict for the plaintiff or defendant. Under such a practice the record would not disclose what estate or interest, if any, the defendant claimed in the premises, and if judgment was given for him, it would not appear whether the jury passed upon his claim or not. The question may have arisen upon the evidence and been passed upon by the jury in favor of the defendant, or the controversy may have been confined to

Opinion of the Court—Deady, J.

[May,

the title of the plaintiff, and the jury may have based their verdict upon the insufficiency of the evidence to support it. Now, if the judgment on the verdict was afterwards pleaded as an estoppel, it would become necessary to ascertain by parol evidence what was proven to the jury and what was or may have been passed upon by them in making up their verdict.

The action given by the Code is simply the common law action of ejectment pruned of its fictions; but the Code goes farther and, by way of remedying the evil above suggested, it provides, that, "The defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof; unless the same be pleaded in his answer," with "the certainty and particularity required in a complaint." The complaint must set forth the nature of the plaintiff's "estate in the property, whether it be in fee, for life or for a term of years, and for whose life or the duration of such term."

The jury by their verdict, if it be for the defendant, must find "the estate in the property or part thereof or license or right in the possession * * * established on the trial by the defendant, if any; in effect as the same is required to be pleaded." (Or. Code, 226-7.)

It also provides that a judgment in ejectment "shall be conclusive as to the estate in the property and the right to the possession thereof, so far as the same is hereby determined upon the party against whom the same is given" and all persons claiming under him, except in certain cases when judgment is given for want of an answer.

As to what is to be considered as having been determined by the judgment of the Circuit Court in *Cline v. Hulery*, the Code prescribes the rule as follows:

"SEC. 727. That only is deemed to have been determined by a former judgment, decree or order, which appears upon its face to have been so determined or which was actually and necessarily included therein or necessary thereunto." (Or. Code, 329.)

Now it is manifest that nothing appears to have been determined by this judgment, except that Mary Cline as

1870.]

Opinion of the Court--Dedy, J.

guardian, was then entitled to the possession of the premises. The Court setting as a jury in its verdict or conclusions of fact, only found that Mary Cline was the guardian of the minor children aforesaid, and as such guardian was in possession of the premises, and that the decree in the divorce suit was unreversed.

On the appeal to the Supreme Court, the judgment of the Circuit Court was simply affirmed. For aught that appears in these judgments, both the Circuit and Supreme Court may have been of the opinion that the decree in the divorce suit, so far as it provided that this property should be vested in the minor children after they become of age, was simply void. The most that can be said to have been determined by the judgment, is that the minor children were entitled to the use of the property according to their respective interests until they became of age respectively, and that in the meantime Mary, as their guardian or trustee, was entitled to the possession thereof and to take and receive the rent and profits for the purpose of their nurture and education.

By the act of October 11, 1864, which took effect January 20th, 1865, (Or. Code, 644) the age of majority for males in this State was fixed at 21 years, and that of females at 18 years. Before the commencement of this action all these minor children, except Jacob, Jr., had become of age. As to these adults, Jacob, Sen., was no longer bound to support them, and the power of the Circuit Court did not enable it to subject his land thereafter to their support, by the intervention of a trustee, guardian or otherwise. As to Jacob, Jr., his term in an undivided fourth of the premises does not expire until he becomes of age or is deceased.

The plaintiff is the owner in fee and in possession of three undivided fourths of the premises, and in reversion of the other undivided fourth, and has a present right to the possession of the whole in common with the tenant for years of the last mentioned undivided fourth.

The plaintiff is also entitled to recover from the defendants Cornell, Moore and of S. M. Tunstall, each, one fourth of the value of the use and occupation of the premises during

the time they have been in possession respectively, and in the case of Tunstall, since his wife Mary Jane became eighteen years of age.

The answers of the defendants also contain a plea of set off for the value of permanent improvements made upon the property by the defendants, or those under whom they claim. But the plea is altogether insufficient, as it does not state that such improvements were made while the parties were holding under color of title, adversely to the claim of the plaintiff, in good faith, but only that they are permanent and valuable. The plaintiff has not replied to the plea, but treated it as an immaterial allegation. On the trial, however, the defendants, without objection from the plaintiff, examined witnesses upon the subject, but I do not think the proof sufficient to warrant the conclusion that the improvements, if any, are either permanent or valuable.

The defendants appear to have paid the ordinary taxes levied upon the property during their occupation, and also some assessments for the improvement of adjoining streets. Although not set up in the pleadings, the parties have stipulated that the amount of these taxes may be deducted from the sum found due the plaintiff for mesne profits.

THE ORIFLAMME. *

DISTRICT COURT, DISTRICT OF OREGON,
MAY 16, 1870.

1. CARRIER MAY SHOW THAT PACKAGE WAS SECRETLY DEFECTIVE.—Although the bill of lading states that a package was received in good order, the carrier may, nevertheless, show that it was secretly defective or insufficient.
2. BURDEN OF PROOF.—The burden of proof is upon the carrier to show that a package receipted for in good order, was in fact secretly defective or insufficient; and unless he does so he is liable for the contents in case of loss.

* Affirmed in the Circuit Court on appeal, November 11, 1870 ; SAWYER, Circuit Judge.

1870.]

Opinion of the Court—Deady, J.

Before DEADY, District Judge.

David Friedenrich, for libellants.*John H. Mitchell*, for defendants.

DEADY, J. This suit was commenced on November 6, 1860, to recover \$400 damages for the non-delivery of certain high-proof spirits, shipped on the *Oriflamme* at San Francisco for the port of Portland.

From the evidence, it appears that the libellants, on October 29, 1869, at San Francisco, shipped on the *Oriflamme*, to be delivered at Portland, two pipes of spirits, 90 per cent. proof. One of the pipes was delivered in good order. The other was found on the wharf at Portland about an hour after it had been discharged from the ship, by the drayman of the libellants, lying on its side, and leaking around its chine at one end, so as to drop freely from the lower side of the chine upon the wharf. The drayman informed the libellants of the condition the pipe was in, and one of the latter went down to the wharf with the former, and finding the pipe leaking as above stated, set it up on end, when it stopped leaking. Thereupon the libellant called the attention of the freight clerk, purser and wharfinger to the condition of the pipe, and it was arranged or agreed between the libellant and clerk and purser that the pipe should be taken to the store of the former and the amount of the loss ascertained, with a view to making a reclamation for the loss. The pipe contained 125 gallons, or what was equal to $237\frac{50}{100}$ gallons of proof spirits. At the store the contents remaining were pumped out and it was found that 91 gallons, or what was equal to $172\frac{90}{100}$ gallons of proof spirits were lost. The purser accompanied the pipe to the store and the bill for the leakage was immediately presented to him by the libellant Hillburg, but he declined to pay it, without giving any reason for not doing so.

A number of witnesses were examined on each side, as to the condition and sufficiency of the pipe, including two of the libellants, and the master, freight clerk and purser of

the ship. In addition, the Court, with the counsel for the parties, examined the pipe.

By the bill of lading it is admitted that this and a similar pipe were “shipped in *apparent* good order.” The word “apparent” does not change the legal effect of the bill of lading. The receipt of the goods and giving a bill of lading therefor is *prima facie* evidence that they were in good order, without an explicit statement to that effect; but in any case, the admission is limited to the external or apparent condition of the package, so far as the same is open to ordinary observation. Therefore, if a loss occurs, the carrier is not precluded from showing that it proceeded from some latent cause or secret defect in the package. But under the circumstances, the burden of proof is upon the carrier, to show that the goods were not in fact in good order, and that, therefore, he is not responsible for the loss.

The pipe in question is about four feet six inches long and near three feet in diameter at the bilge, and is evidently a second-hand one. The quarter and bilge hoops have been driven up nearly an inch, as is shown by the rust marks left upon the staves. But this only indicates that the pipe has been in use long enough to rust the hoops on the inside, and that thereby they became enlarged and loosened and required to be driven up. The staves are oak, a full inch thick, and in a sound condition. No worm holes or other defects can be seen in the pipe, and no witness testifies to having discovered any. There are two hoops at each chine. The leakage all occurred at one chine of the pipe, and the hoops at that chine had been driven or forced outwardly about a quarter of an inch for at least one half of the circumference of the pipe.

From the testimony of the officers of the ship, it appears that the pipe was rolled from the wharf on to the deck at San Francisco and then slung with ropes into the lower hold, and stowed fore and aft on a “bed,” or pieces of wood laid “athwart ships,” but whether there was only a single piece of wood or dunnage under each end of the pipe or more, does not appear. On top of the pipe there were stowed case goods for about five or six feet in depth. The

1870.]

Opinion of the Court—Deady, J.

leaking condition of the pipe was not noticed by the officers until after it was discharged at Portland, but the first officer testifies that he stowed it, that its position was not changed during the voyage, and that he noticed the deck was wet where it laid.

Bolles, the Master, testified that he examined the pipe on the wharf at Portland, and that there was putty or clay packed around the chine of the head where the leak occurred, and painted over, and that the motion of the ship had started this putty or clay out and caused the leak. This is the only witness for the claimant that attempts to account for the leak in this way, but my own inspection of the pipe concurs with the testimony of the other witnesses, that there was no putty or clay, or anything of the kind, in the chine of the pipe. The freight clerk did say that in San Francisco, when he was receiving the two pipes on the wharf, he “thought *once* that one of the heads was cracked and covered up with mud or putty and painted over.” But which head it was, and of which pipe, and whether he thinks so *still*, he does not testify. As he receipted for both pipes in good order, it is not to be presumed that he *then* thought that either head of either pipe was cracked and covered up with mud or putty.

Wormser, of Wormser Brothers, of San Francisco, testified that they shipped these two pipes to libellants, and that they were full and in good condition. That they purchased them of the California Commercial and Manufacturing Company and had had them in their possession about a month, during which time they never leaked.

Bottler, a cooper called by claimant, testified that he had examined the pipe at request of one of the officers of the ship, and that he “thought the staves rather light for such a large cask, and in his opinion this was the cause of the leakage.”

Hulery, a cooper called by the libellants, testified that on November 4, he examined the pipe in question, at the request of the claimants, and that it was sufficient to carry high proof spirits. That the pipe had been stowed with only two bearings, each about half way between the bilge

and the chine, and that the weight of the pipe and the freight upon it had pressed the staves in at this point, where it lay upon the dunnage, and thus opened them at the chine which caused the leak; and that a pipe of this size should be stowed so as to have four bearings. He also stated that the chine hoops, at the end where the leak occurred, were not up to their place by one fourth of an inch.

The loss of the spirits is established beyond controversy, and the bill of lading shows that apparently the pipe was in good order—was a proper and sufficient vessel in which to ship the spirits. This makes a *prima facie* case upon which the libellants are entitled to a decree, unless the claimant overcomes it by proof to the contrary. It is not sufficient that the evidence should raise a doubt as to the sufficiency of the cask, it must establish the fact that it was not in good order. Otherwise the admission in the bill of lading must be considered as true.

The evidence before the Court does, not in my judgment, establish that the pipe was insufficient in any particular, but rather the contrary. The loss must be presumed to have occurred from the negligence or unskilfulness of the carrier or his employees. It is not necessary to determine how it was done, although it is highly probable that it occurred as suggested by the witness Hulery. And here I must remark, that it does not speak very well for the diligence and care of those having charge of this package, that it should have been discharged upon the wharf and left to lie there on the bilge with the contents dripping out at the head, until it was found and set up by one of the libellants and his drayman.

Consequence, in this connection, is sought to be given to the clause in the bill of lading, whereby it is agreed that the claimant “is not accountable for leakage or breakage arising from improper or defective packages or casks.”

But this provision does not alter the law or affect this case. The claimant would not be liable for a loss “arising from improper or defective packages or casks” whether this clause was in the bill of lading or not. The question here is, did the leakage occur because the pipe which contained the

1870.]

Opinion of the Court—Deady, J.

spirits was an improper one or defective? The burden of proof is upon the claimant, to show that the loss arose from the insufficiency of the cask.

The only direct evidence in the case against the sufficiency of the cask is the expression of Bottler, that he "*thought* the staves were too thin for such a large cask." No reason is given for this opinion, nor did the witness attempt to state how thick the staves should be. Thick and thin are relative terms and have no particular signification unless used with reference to some admitted or established standard of thickness or thinness. Of course, upon this point I make no account of the story of the putty or mud in the chine, as that is evidently a mistake. Hulery, who impressed me with his fairness and intelligence, thought the cask a sufficient one, and stated that it was usual to ship high proof spirits to this port in such casks. Upon this question of the strength of the staves *some* weight ought to be given to the fact that the manufacturers in San Francisco put these spirits in this cask in the course of their business, and that the wholesale dealers shipped them in this condition, to their customers in Portland, after the pipe had been in their possession and under their eye for a month. The thickness of the staves was a matter within ordinary observation, and both the manufacturers and dealers must be presumed to have deemed the pipe sufficient in that respect.

In *The Live Yankee*, Deady's R., the case turned upon the question, whether the slipping of the staves in the head of a wine cask whereby the contents leaked out, was the result of an insufficient or defective cask, or ill handling, or stowage by the carrier. The casks were receipted for in good order. The Court decreed for the libellants, and said:

"What caused the shifting of the staves, and whether the head was of proper material and workmanship to support the ordinary handling and pressure of such a voyage, may admit of difference of opinion. The respondents have not shown that there was any secret defect or insufficiency about the cask to cause this leak. By their receipt they acknowledged, that the cask was in good order when they received it. * * * Unless, then, this injury or slipping

of the stave was the necessary or probable result of the insufficiency of the workmanship or material of the cask or some part of it, the libellants are entitled to recover."

So in the case at bar; the claimants having failed to show that the leakage and loss were the necessary or probable result of the insufficiency of the pipe from lack of strength, decay, or other defect, the legitimate and only conclusion is, that it occurred through the fault of the carrier, and the libellants must therefore recover.

The loss was 91 gallons, which reduced to proof spirits gives 172 90-100 gallons. This was worth at this port at the time of the non-delivery \$1.50 per gallon in coin, which reduced to currency at 88 cents on the dollar makes the loss \$294.71. Add to this six months interest at the legal rate (\$14.73) and the sum is \$309.44 for which the libellants must have a decree, with costs and expenses of suit.

FOSTER C. GOODRICH *et al.* v. THE BARQUE
DOMINGO, ETC.*

DISTRICT COURT, DISTRICT OF CALIFORNIA,
JUNE 7, 1870.

1. FISHING VESSELS.—RIGHTS OF SEAMEN.—Where by the articles the crew of a fishing vessel were bound to make the fish, and on the arrival of the vessel the owners declined to allow them to do so, and the men remained by the vessel for nearly two months, at all times ready and willing to make the fish, and then left her and sued for their shares of the catch: *Held*, that their readiness and willingness to make the fish were equivalent to an actual performance of their contract; and that they were entitled to be paid their shares. Various charges made by the owners disallowed.

Before HOFFMAN, District Judge.

Milton Andros, proctor for libellants.

W. H. L. Barnes, proctor for claimants.

*Decree affirmed on appeal, at the October Term, 1870, of the Circuit Court: by SAWYER, Circuit Judge.

1870.]

Opinion of the Court—Hoffman, J.

HOFFMAN, J. This suit is brought to recover the shares due the libellants of the proceeds of the catch of fish, on a fishing voyage in the above vessel. The contract, as stated in the articles, which were signed at Honolulu, is as follows:

“The crew shall receive instead of monthly wages two fifths of the sales of the fish taken on said voyage. It is intended and agreed to hire as many men as it is deemed advisable to fish on said voyage, the crew or sharesmen to pay the wages of said hired men, and they are to draw two fifths of the sales of said fish caught by them. They, the sharesmen, are also to pay two fifths of all expenses, viz: clearing and entering the vessel, pilotage, wharfage, storage, flake hire, duties, commissions, and other expenses which may be incurred in the sales of the proceeds of said voyage. The crew to dry the fish and deliver them on the wharf in San Francisco. They, the sharesmen, are to pay two fifths of the cook's wages on said voyage.”

Under this agreement, the vessel on May 12, 1869, proceeded on her voyage, having on board some eight or ten Kanakas, hired in accordance with its terms. She arrived at this port on the twenty-seventh October, with about eighty tons of fish.

The men at once applied to the master and owners to proceed to dry, or as the technical phrase is, “make” the fish, offering their services for the purpose. But, though frequently solicited, the master and owners declined to allow the fish to be made. The men were unable to obtain any settlement or compensation, and fearful of impairing their rights by leaving the vessel, remained on board until the eighteenth December, but they did no work, and paid their own expenses for subsistence.

The reason assigned by the owners for their delay in making the fish is the following: At the time of the arrival of the vessel the market for fish was greatly overstocked. The nominal price was twelve cents per pound, but this could only be obtained for small quantities, and was due to the fact that all the holders of the article had entered into a combination by which all the fish in the market were put into a common stock, and held at a fixed price. All sales

made by the common agent of all the parties, were credited to each in the proportion which his contribution to the common stock bore to the whole.

As the stock of made fish was more than sufficient to supply the demand, it was for the interest of the owners of the Domingo's cargo to postpone the making of the fish; for when made they are liable to deteriorate in quality; and the cargo, though not made, was credited to them as a contribution to the common fund, and entitling them to receive its proportional share of any sales which might be made.

The making of the Domingo's fish was, therefore, not commenced until February, 1870, and a considerable portion of the cargo still remains unsold, or to speak more accurately, the owners have not received on account of that cargo, shares of the proceeds of sales amounting to more than about twenty or twenty-five per cent. of its entire value. But they have received on account of sales credited to other cargoes owned by them and put into the common stock, sums exceeding in amount the value of the Domingo's cargo, had all the sales been credited to that cargo alone.

It is contended on the part of the respondents, that, inasmuch as the articles are silent as to the time within which the fish were to be made—that the law will imply that it was to be done within a reasonable time—and that the time taken, was not, under the circumstances, unreasonable. To this latter proposition I cannot assent. The owners were entitled to a reasonable time—but it was a reasonable time to make the fish with all convenient and usual despatch. The nature of the agreement and the fact that the sharemen were seamen, who looked to their share of the proceeds as their only compensation for their services, forbid the idea that it could have been intended that they should wait an indefinite period at their own charges, in port, until the state of the market might make it for the interest of the owners to dry the fish, or until the proceeds of the cargo might be realized by the slow process which the owners, in view of their interest in other cargoes, saw fit to adopt.

I consider, therefore, the readiness and willingness on the part of the men to make the fish, as equivalent to a per-

1870.]

Opinion of the Court—Hoffman, J.

formance by them of their agreement, and that the refusal of the master and owners to allow them to do for so long a period, amounted to a waiver by the latter of that part of the sharesmen's contract. The men, therefore, have the same rights as if they had actually made the fish, nor can any charge be allowed against them for the wages and provisions of the substitutes who were subsequently hired to do the work.

These charges must, therefore, be struck out of the account rendered by the owners.

In this account are embraced two sets of charges. The first claimed to be payable in full by the sharesmen. The second are those for only two fifths of which they are charged. Amongst the first are several items of expenses incidental to the shipment of the Kanakas.

The chief items are for expense of drawing a bond for the return of the Hawaiian seamen; for tax to Hawaiian Government for passage money of Kanakas from this port to Honolulu, after their discharge; for fees to Hawaiian Consul at this port. All these expenses were no doubt necessarily incidental to the employment of the Hawaiian seamen. But I am at loss to perceive how they can be charged to the sharesmen. By the articles, the latter agreed to pay the wages of the men hired at Honolulu, but nothing more. Nor does it seem unreasonable to restrict their liability to the payment of wages; for the expense of supplying provisions, which fell upon the ship, bore but a small proportion to the wages, which were to be paid by the sharesmen, while the ship received three-fifths of the fish caught by the Kanakas, and the sharesmen only two-fifths.

Even if the terms of the contract were doubtful or ambiguous, the Court, by a well settled rule, would be bound to give to it a construction most favorable to the seamen. (1 Sprague, 300; *Jackson v. Hendricks*, Crabbe's R. 228.) But there is no ambiguity; and to charge the sharesmen, under an agreement to pay "wages," with the other incidental and consequential expenses attendant upon the hiring of the men, would be, not to construe the contract, but to in-

introduce into it an entirely new stipulation. The charge for wages paid to the Kanakas must, therefore, be confined to the payments made to them for wages earned during the voyage and up to its termination.

Among the expenses, two fifths of which are charged to the sharesmen, are two items for pilotage into and wharfage at Honolulu. These charges are defended on the ground, that although the shipping articles for the fishing voyage were signed at Honolulu, yet the men had originally joined the ship at this port, with the understanding that she was to proceed to Sydney and thence to Honolulu, where the Kanakas were to be hired and the fishing voyage was to commence. It is therefore claimed, that the charge for pilotage in going into Honolulu and of wharfage while there, should be borne by the men. This claim is wholly inadmissible.

The men did not sail from Honolulu under any contract made at this port. Not only was a new agreement made at the former place, but it appears in proof that they had been previously discharged and their connection with the ship completely severed. The new engagement was entered into at the master's solicitation, and after some little hesitation on the part of the men. It referred to the voyage then to be commenced, and the charges for pilotage, wharfage, etc., to be borne by the men, were charges to be incurred in the course of the voyage to which the articles referred.

To charge them with an expense incurred and paid by the ship before the agreement was entered into, would be absurd.

It may be, however, that some part of the wharfage expense was incurred on account of the fishing voyage, while the vessel was taking in salt or other supplies. I shall, therefore, allow one half of this item. There are also charged to the men two fifths of the fees paid to the Custom House Inspector on duty while the vessel remained undischarged at this port. They amount in all to \$272.01.

In respect to these, it is to be observed that they must in great part have been incurred in consequence of the owners' determination to postpone for several months the discharge of the ship. It would be manifestly unjust to charge the whole expense of this to the men, even if they were liable for any part of it. But, in fact, they are not liable for any

1870.]

Opinion of the Court—Hoffman, J.

part. Their agreement was to pay two fifths of the duties, other except for entering and clearing the vessel; Custom House charges are not mentioned. The articles were drawn by the owners. Had it been intended to include inspector's fees, it should have been so stated.

The remaining item objected to on the part of the libellants is a charge of two fifths of a certain allowance, or, as it is called, "commission," paid to the master. It amounts to one half a cent per pound on the whole catch. This appears to be the usual allowance to the master of a fishing vessel, and in this case constituted his only compensation. The articles provide that the sharesmen are to pay two fifths of "all expenses, viz.: clearing and entering the vessel, pilotage, wharfage, storage, flake hire, duties, commissions and other expenses which may be incurred in the sales of the proceeds of the said voyage." The commissions here referred to are evidently commissions on the sales of the proceeds of the voyage. The compensation or allowance to the master in lieu of wages, can hardly be called a "*commission*," and if the men, in addition to paying the wages of the Kanakas, and two fifths of the wages of the cook were also to pay two fifths of the master's wages or compensation, it should have been so stated in clear and unequivocal terms. The charge must, therefore, be disallowed.

In the account rendered by the owners the value of the fish is stated at eight cents per pound. This is quite as much, perhaps more, than could have been justly claimed, had the owners, on the arrival of the vessel and when they determined to enter into the combination and postpone indefinitely the drying of the fish, made a prompt settlement with the men.

But I regard this valuation of the cargo by the owners in their account rendered to the men as an admission, and in view of the long and unjust delay (more than seven months) to which the seamen have been subjected, I think they should be bound by it.

The account must, therefore, be referred to the clerk to be restated in accordance with the foregoing, all items not herein rejected to be allowed, and a decree entered in favor of the libellants for the amounts found due to them respectively.

UNITED STATES v. 133 CASKS OF DISTILLED SPIRITS,
ETC. v. FUNKENSTEIN & Co., *Claimants*; and
THE UNITED STATES v. 2 PACKAGES OF DIS-
TILLED SPIRITS, v. FUNKENSTEIN & Co.,
Claimants.

DISTRICT COURT, DISTRICT OF CALIFORNIA,
JUNE 7, 1870.

1. ACT OF JULY 20, 1868, SECTIONS 25, 45 AND 96 CONSTRUED.—1. The knowing and willful omission, neglect and refusal of the wholesale liquor dealer to cause packages of distilled spirits to be gauged, inspected and stamped, as required by section 25 of the Act of July 20, 1868, expose the distilled spirits and liquors owned by the wholesale liquor dealer to the forfeiture denounced in the 96th section of the Act.
2. THE LANGUAGE OF SECTION 96 of the Act of July 20, 1868, denouncing the forfeiture is not uncertain. "All distilled spirits or liquors owned by him shall be forfeited," is to be construed to mean all distilled spirits and liquors. It was not intended to discriminate between distilled spirits and liquors, and to create an alternative forfeiture of one exclusive of the other, but to include within the general term "liquors," whatever the more special term "distilled spirits" might not embrace.
3. THE PROVISIONS OF THE 69TH SECTIONS of the Act of July 20, 1868, do not apply to infractions of the provisions of the 45th section.

Before HOFFMAN, District Judge.

W. W. Morrow, Assistant U. S. District Attorney for the United States.

Robert Harrison, attorney for claimants.

HOFFMAN, J. The demurrer to the informations in these cases, present two questions:

1st. Does the 25th section of the Act of July 20, 1868, make it the duty of the wholesale liquor dealer, whenever any cask or package of distilled spirits shall be filled for shipment, sale or delivery, on the premises of any wholesale liquor dealer, to cause the same to be gauged, inspected and stamped, as provided for in that section; and does the knowing and willful omission, neglect and refusal, to do so expose the spirits and liquors owned by the wholesale liquor

1870.]

Opinion of the Court—Hoffman, J.

dealer to the forfeiture denounced in the 96th section of the Act?

2d. Do the provisions of the 96th section apply to infractions of the provisions of the 45th section.

1. The clause of the 25th section under which the forfeiture in these cases is supposed to have been incurred, is as follows:

“ Whenever any cask or package of distilled spirits shall be filled for shipment, sale, or delivery, on the premises of any wholesale liquor dealer, or compounder, it shall be the duty of a United States gauger, to gauge and inspect the same and place thereon an engraved stamp signed by the collector,” etc., etc.

The 96th section provided, that if any distiller, etc., shall knowingly and willfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited * * * all distilled spirits or liquors owned by him, or in which he has any interest as owner, shall be forfeited to the United States.

The question thus arises: Has the liquor dealer in this case knowingly and wilfully omitted, neglected, or refused to do, or cause to be done, any of the things required by law in the carrying on or conducting his business?

The duty of inspecting, gauging, and stamping, is that of the gauger. But the inspecting, gauging, and stamping, are clearly “ things required by law in the carrying on of the business.”

These it was the duty of the liquor dealer to cause to be done, by calling on the gauger to perform his duty, and the information charges that the liquor dealer has knowingly and willfully neglected to cause them to be done. When the statute makes the neglect to cause a thing to be done an offense, it is clear that the thing is to be done by some other person than the offender, and that the guilt of the latter consists in his neglecting to procure the services of the former.

If, then, this clause of the 96th section is to have any operation, it must apply to a case like the present, where the liquor dealer has neglected to cause to be done one

of the most important things required by law in the conducting, and carrying on of his business, viz: the inspection, gauging, and stamping of his casks.

If the 96th section is to be construed as applying only to omissions to do any of those things which the law expressly makes it the duty of the offender to do, the phrase "*or cause to be done*" would be inoperative. The insertion of that phrase seems to indicate the intention of Congress to make the omission to cause to be done any of the things required by law, an offense in cases where it is not the duty of the offender himself to do them; and in this view, the words "*knowingly and willfully*" find an appropriate place in the statute; for they restrict the operation of the statute to those cases where the offender, knowing what is required by law in the carrying on of his business, and what are the duties to be performed by the gauger, willfully neglects to call upon or notify him to perform them, and thus "*omits to cause to be done the things required by law in the carrying on of his business.*"

I am aware that on this question there is a conflict of authority.

A construction similar to that adopted above, was given to the statute by Judge Hall, of the United States District Court for the Northern District of Mississippi (XI Internal Revenue Record, page 45), while an opposite view was taken by Judge Ballard, of the United States District Court for the District of Kentucky.

It is, therefore, not without doubt that I announce my conclusion.

It is also objected, that the ninety-sixth section is inoperative for uncertainty, the language being, "*all distilled spirits or liquors owned by him shall be forfeited.*"

I do not find that the objection has been taken in any reported case. The meaning of the statute is unmistakable, and the word "*or*" is to be construed to mean "*and*," or the phrase is to be taken to be one of those pleonasms so common in legal phraseology, where a second and more general word is introduced, out of abundant caution to cover and include whatever by possibility may not be embraced by the first.

1870.]

Opinion of the Court—Hoffman, J.

It was not intended to discriminate between “distilled spirits” and “liquors” and to create an alternative forfeiture of one exclusive of the other, but to include within the general term “liquor” whatever the more special term “distilled spirits” might not embrace. But all the articles under either denomination are to be forfeited.

The demurrers to the first and second counts of each of the informations are therefore overruled.

The third count in each of the informations is admitted to be defective, and the demurrers are sustained.

The objection to the fourth count in each information is also well taken.

The informations are based upon the idea, that the provisions of the ninety-sixth section can be applied to infractions of the provisions of the forty-fifth section.

The penalties and forfeitures imposed by the ninety-sixth section are, by its terms, limited to those cases “where no specific penalty or punishment is imposed by any other section of the act for the neglecting, omitting, or refusing to do, or for the doing, or causing to be done, the things required or prohibited.”

But the forty-fifth section does provide a specific penalty and punishment for the violation of its provisions. The ninety-sixth section can, therefore, have no application to cases arising under that section.

On this point I have nothing to add to the very clear and conclusive argument contained in the opinion of Mr. J. Hall, already cited.

It is further objected to the information against two packages of distilled spirits, that they are not averred to be liquor or distilled spirits.

But the seizure of two packages of distilled spirits is distinctly alleged, and the goods are described as such throughout the information. The averments seem to me sufficient, as are also those relating to the ownership of the property, and the time of the commission of the offenses.

THE UNITED STATES *v.* P. SMITH.

DISTRICT COURT, DISTRICT OF CALIFORNIA,

JUNE 7, 1870.

1. PAWNBROKERS' TICKETS.—The ticket given by a pawnbroker under the Statute of California is "an agreement or contract" within the meaning of section 170 of the Internal Revenue Act of 1864.

Before HOFFMAN, District Judge.

L. D. Latimer, U. S. District Attorney.*Shafter, Southard & Seawell*, for defendant.

HOFFMAN, J. The demurrer in this case raises the question, whether the check or ticket given by a pawnbroker in accordance with the statute of this State is "an agreement or contract" as described in schedule B, section 170, of the Internal Revenue Act of 1864.

The language of the schedule is, "agreement or contract other than domestic and inland bills of lading, and those specified in this schedule, * * * five cents."

The check delivered to the pawnor in this case is headed "pawnbroker." Then follow the street and number of his shop, and the date of the loan. It then describes the property pledged, the sum loaned, with the name and residence of the pledgor. To this succeeds a memorandum as follows:

"Loan for one month at ten per cent. in advance; over time, same terms. P. SMITH."

It will be perceived that this receipt or memorandum contains all the particulars of the contract between the parties. It is signed by the party to be charged, and distinctly sets forth the terms and conditions of the bailment. On its face it is as much a contract as a bill of lading or a warehouseman's receipt.

It is urged that inasmuch as the statute requires the pawnbroker to enter in a register book the various particulars of loans made by him, and pledges deposited with him, and to "deliver at the same time a memorandum signed by him containing a copy of the said entry; that the

1870.]

Opinion of the Court—Hoffman, J.

memorandum so delivered is not a contract or agreement, but merely a copy of an entry made in obedience to the law."

The terms, contract or agreement, as used in the Internal Revenue law, of course, refer not to the convention or agreement made by the parties, but to the evidence of it contained in a writing. In this sense the pawnbroker's receipt and memorandum of the date, amount and terms of the loan, and a description of the property pledged, is a contract or agreement between the parties as much as any other written memorandum which embodies and states in writing the terms of an agreement to which the parties have assented. The statute does not require merely that a copy of the entry shall be delivered to the pledgor, but that "*a memorandum be delivered to him, signed by the pledgee, containing a copy of said entry.*"

As the previous clause required that every particular necessary for the pledgor's protection should be entered in the register book, it was unnecessary to re-enumerate those particulars in the subsequent clause which describes the ticket to be delivered to the pledgor. It was, therefore, provided merely, that the memorandum should contain a copy of the entry on the register, and should in addition be signed by the pawnbroker. It cannot be presumed that by adopting this mode of specifying the contents of the ticket to be delivered to the pledgor, the Legislature meant in any way to impair its availability to him, or its obligation on the pawnbroker, as a contract or agreement between the parties.

It is suggested that pawnbrokers' tickets, being in common use, would have been specifically mentioned if intended to be subjected to the 5 cents tax.

There may be some force in this suggestion, but it may be that Congress regarded these instruments as so clearly "contracts," as not to require specific mention; and as the amounts to which they related is usually small, a uniform tax was imposed under a general description. Whereas, in other instruments and receipts, the tax being proportionate to the sums to which they related, they were necessarily mentioned specifically.

Opinion of the Court—Hoffman, J.

[June,

A far stronger argument in favor of the construction adopted is furnished by the fact that the tax of five cents has been collected on pawnbrokers' checks, under instructions of the Commissioner of Inland Revenue, since the passage of the Act, and no case is reported where the collection of the tax has been disputed or resisted.

I am, therefore, of opinion that the pawnbroker's check mentioned in the declaration is a contract or agreement, and that a stamp of five cents should have been affixed to it, as required by law.

The demurrer is therefore overruled.

ALEXANDER HARDY, *et al.* v. JAMES M. HARBIN, *et al.*

CIRCUIT COURT, DISTRICT OF CALIFORNIA,
JUNE 21, 1870.

1. PATENT FOR MEXICAN GRANTS—PURCHASERS FROM PATENTEE.—Where a bill in equity was filed by the alleged heirs of a deceased Mexican grantee of a rancho, and the defendants were purchasers for value and without notice from parties by whom the claim had been presented to the Board of Commissioners, who had obtained a confirmation, and to whom a patent had been issued; and it appeared that these parties derived title under a sale made by a Probate Court, which it was subsequently decided by the Supreme Court of this State had no jurisdiction: *Held*, that the defendants were not chargeable with constructive notice of the invalidity of the derivative title presented by the patentees to the Board, and that the legal title acquired by them under the patent, should be protected as against the equitable rights set up by the alleged heirs of the Mexican grantee.

Before HOFFMAN, District Judge.

W. W. Chipman & B. S. Brooks, for complainants.

J. B. Harmon, for defendants.

HOFFMAN, J. The complainants in this case are the children of one John Hardy, a native of Canada, who, it is alleged, left that country in 1832, and after various wanderings arrived in California, where, having become a Mexican

citizen, and assumed the name of Thomas M. Hardy, he obtained from Governor Micheltorena a grant of the premises in controversy. This grant is dated October 23d, 1843.

In October, 1848, Hardy died, leaving no heirs or relatives residing in this State. One Stephen Cooper, to whose house Hardy's body had been carried from the rancho at which he had died, and who had buried him, thereupon applied to C. P. Wilkins, then acting as Prefect, to be appointed as administrator of Hardy's estate. Letters of administration were accordingly issued to him on the twenty-seventh day of March, 1850.

On the twelfth March, 1851, Wilkins, whose office had previously been abolished, transferred the papers and documents in the case to the then recently organized Probate Court.

Soon afterward, the Probate Court, on the petition of the administrator, made an order for the sale of the real property of the deceased, and it was accordingly sold for the sum of \$6,000. The sale was confirmed by the Probate Court, and in July, 1851, a conveyance was executed by the administrator to the purchasers.

In 1852, the claim of the purchasers and parties deriving title from them, was presented to the Board of Commissioners for confirmation.

In July, 1855, the claim was confirmed by the Board, and in March, 1857, by the District Court on appeal. This decree having been made final by consent of the Attorney-General of the United States, a patent was issued to the claimants in July, 1858. The defendants claim title under the patent by conveyances subsequent to its date, with the exception of two or three who obtained their deeds after the final confirmation, but before the patent issued.

The complainants insist, that the Prefect of the District of Sonoma had no jurisdiction over the estate of Hardy, or authority to appoint an administrator thereof; that all acts under color of such appointment are null and void, and that the Probate Court of Solano County acquired no jurisdiction by the transfer to it, by the Prefect, of the papers in the case.

Opinion of the Court—Hoffman, J.

[June,

They also insist, that even if the Probate Court acquired any jurisdiction over the estate, it never acquired jurisdiction to order a sale of the real property of the decedent, by reason of various defects and omissions in the petition and proceedings for the sale, which the bill sets forth; and also, that the sale was vitiated by fraudulent practices on the part of the administrator and purchaser, which the bill details at length; that the whole proceeding was the result of a fraudulent conspiracy against the rights of the absent heirs of Hardy; and that the defendants had notice of these frauds before they acquired their respective interests.

The bill further alleges, that the complainants never received any intelligence of their father after he left the Mississippi river, in 1833 or 1834, except by a letter written from Monterey in 1847 or 1848, and until within the last three years had no information as to his residence or movements, or of the acquisition by him of the property, or of the various proceedings relating to the same, set forth in the bill.

They ask, therefore, that the defendants may be charged, as the trustees of the title of the real estate, to the extent of the several interests held by them, for the benefit of the complainants, and that they may be decreed to transfer the same to them, and deliver up the patent and all other muniments of title connected with the property.

The defendants, at an earlier stage of the cause, interposed a demurrer to the bill, which, after argument, was overruled by the presiding Judge of this Court, on the ground that the patent, which was presumed to contain the usual recitals, was a constructive notice to all who purchased under it, of the fact, that the patentees deraigned title through a sale by an administrator, and that they were thus put on inquiry, and charged with notice of the invalidity of that sale, and the nullity of the proceedings which led to it.

The demurrer having been overruled, an answer was put in, which, in substance, denies that John Hardy, of Canada, was the same person as Thomas M. Hardy, of California; denies the alleged frauds; denies all knowledge or notice on

1870.]

Opinion of the Court—Hoffman, J.

the part of the defendants of such frauds, if they were committed, and all knowledge or notice of the invalidity of the proceedings in the Probate Court. On the issues so made, a vast number of depositions have been taken; elaborate arguments were heard, and the cause now comes up for final determination.

The evidence in support of the charges of fraud is unsatisfactory and inconclusive; no attempt whatever was made to sustain by proofs the greater part of the allegations of the bill, which state the facts and circumstances constituting the imputed fraud. So far as appears, the Judge acted under the belief that the Probate Court possessed jurisdiction to order the sale, and that the proceedings were regular and fairly conducted. The order confirming the sale recites that "the confirmation was objected to, and that the Court thereupon proceeded to examine and hear all proofs introduced relative to said sale; and that it appeared to the Court by proof made in open Court that notice of the sale had been given, by publication in a newspaper, and posting up notices as prescribed in the statute; that the sale was legally made in pursuance of the order of the Court, and that it was in every respect fairly conducted; and that a greater sum than the amount specified in said report as having been bid cannot be obtained. It is therefore adjudged that the objections to the confirmation of said report be overruled, and that the same be confirmed," etc.

The only evidence against the truth of these recitals, is the testimony of a few persons who assert that they attended at the place of sale designated in the notices, and finding no one, returned; but that the sale in fact took place at a spot some twelve miles distant, and that had they been present they would have been prepared to bid a larger amount than was obtained. Some evidence is also offered to show that a party who attended the sale was in some way induced not to bid.

But these circumstances, even if true, are wholly insufficient to sustain the charges in the bill, of a fraudulent and corrupt conspiracy between the Probate Judge, the administrator and the purchasers at the sale. The notices of sale

are not produced, nor is there a particle of evidence to show that either the Judge or the administrator had any interest in or derived any benefit from the purchase.

Without dwelling longer on the evidence, it is sufficient to say that the complainants have failed to establish this part of their case.

But even if the fact were otherwise, it is clear that they have not succeeded in bringing home to the defendants actual notice of the alleged frauds. The latter were aware that the land had been granted to Hardy, and that it had been sold at an administrator's sale—but of the invalidity of that sale by reason of frauds perpetrated by the Judge, the administrator and the purchasers, or by reason of the want of jurisdiction in the Court, none of them seems to have been advised.

The circumstances of the case compel the complainants to admit a superior title in the defendants as holders of the legal estate under the patent, and to avoid it by an allegation of fraud and notice of their equities. The burden is therefore on them to aver and prove the fraud and the notice (*Curtis v. The Bank*, 22 Ala. 742), and the defendants will have the advantage of requiring that their account of the matter should be received as true, unless conclusively disproved. (1 Littell, 42; 7 J. J. Marshall, 301; 3 Gell & Johns. 425; cited in Lead. cases in Eq., Hare & Wallace's Notes, vol. 2, p. 126.)

It will not be pretended that the mere knowledge that the land had been originally granted to Hardy, and that the patentees deraigned title through an administrator, could have any effect to charge the defendants with notice of any fraudulent proceedings in effecting the sale.

They could at most be affected with notice of what the record of the Probate Court disclosed—or of the absence of jurisdiction in the Court over the estate sold. Whether they were charged with notice even to this extent will be hereafter considered. But of frauds in fact the record disclosed nothing—on the contrary, the judgment of the Court declared that the sale had been duly advertised, fairly conducted, and was for an adequate price.

1870.]

Opinion of the Court—Hoffman, J.

In the very elaborate arguments of the counsel for the complainants, but slight allusion was made to the evidence in support of the charges of fraud and actual notice. That part of the case seemed to be virtually abandoned.

I dismiss it, therefore, from further examination, and proceed to consider the important and novel questions with respect to constructive notice, presented in the case.

It is not denied that the Supreme Court of this State has decided that the statute for the settlement of the estates of deceased persons has no application to the estates of parties who died previously to the organization of the State Government. (*Grimes' Estate v. Norris*, 6 Cal. 621; *Tevis v. Pilcher*, 10 Cal. 405; *Downer v. Smith*, 24 Cal. 114.)

The proceedings, therefore, in the Probate Court of Solano County were a nullity, and the deed of the administrator conveyed no title whatever to the purchasers at the sale.

On the other hand, it appears that the defendants are the holders of the legal estate, under the patent of the United States; that they purchased from parties who were and had long been in the actual, notorious, undisputed and exclusive possession of the land; that they paid full value for their respective purchases; and that they had no knowledge of any alleged frauds on the part of those from whom they derived title, or of the invalidity of the proceedings in which that title originated.

They are thus innocent, *bona fide* purchasers for value, and without notice except so far as, under the circumstances of the case, they are charged with constructive notice.

The question thus presented is of great importance. Its determination may affect the rights of all persons who may have purchased from the patentees of confirmed land claims in this State. It is also, I believe, novel; for it arises, not as heretofore between the patentees and the representatives of the original grantee, but between those representatives and purchasers from the patentees, after the confirmation of their claim, and the issuance to them of a patent conveying the legal title previously outstanding in the United States.

In the opinion rendered by Mr. Justice Field, when overruling the demurrer in this case, it is assumed that the patent was in the usual form, "with a recital of the existence of the grant, the conveyance of the grantee's interest by the administrator, the confirmation of the claim under the grant, the survey upon the confirmation, and the approval of the survey," etc. The patent was not at that time submitted to the inspection of the Court. In fact, it contains no recitals with respect to the grant or the title of the patentees, except that they presented a claim for the rancho of "Rio de Jesus Maria," founded on a Mexican grant, made by Gov. Micheltorena on the twenty-third day of October, 1843; that this claim was confirmed by the Board of Land Commissioners and by the District Court; that the judgment, on appeal of the District Court, was made final by stipulation. A survey was made, duly approved and certified to by the Commissioners of the General Land Office.

The patent does not even refer to the original grantee, still less to any of the conveyances by which the patentees deraigned title. For aught that appears on the face of the patent, the patentees might have been the original grantees of the land.

It is contended, however, that the patent refers to and recites a Mexican grant; to proceedings upon this grant before the Board and the United States District Court, that it mentions the name of the rancho, the date of the grant, and by whom granted; and that it contains an express stipulation, in accordance with the statute, that the interests of third persons shall not be affected thereby; that the purchasers from the patentees were thus directed to the source of title of the latter, and were bound to take notice of the records of the Board of Land Commissioners, and especially of the transcript and records of the District Court; and that these, if consulted, would have disclosed the fact that the patentees claimed title under an administrator's deed which was a nullity.

The general doctrine is well settled, that the purchaser of a legal title will be liable to all equities of which he had actual or constructive notice at the time of the purchase;

1870.]

Opinion of the Court—Hoffman, J.

for by taking the legal estate, after notice of a prior right, he becomes a *mala fide* purchaser. (*LeNeve v. LeNeve*, 3 Atk. 6-9.)

But a purchaser *bona fide*, without notice of any defect in his title at the time of the purchase made, may (as is said by Lord Nottingham, in *Basset v. Nosworthy*, Cas. Rep. temp. Finch, 162) “lawfully buy in a statute, or mortgage, or any other incumbrance; and if he can defend himself at law by any such incumbrances bought in, his adversary shall never be aided in a Court of Equity by setting aside such incumbrances; for equity will not disarm a purchaser, but assist him. And precedents of this nature are very ancient and numerous, where a Court hath refused to give any assistance against a purchaser, either to an heir, or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another.”

In *Jones v. Powles* (3 My. & K. 581), a person who had advanced money upon a mortgage of an estate which the mortgagor claimed under a will, which turned out to be forged, got a conveyance of the legal estate which was outstanding in a mortgagee whose debt had been satisfied. Upon a bill filed by the heiress-at-law, it was held that the mortgagee being a purchaser without notice of the plaintiff's title could protect himself by the legal title. And Sir John Leach, M. R., says: “Upon full consideration of all the authorities which have been referred to, and the dicta of Judges, and text-writers, and the principles on which the rule is grounded, I am of opinion that the protection of the legal estate is to be extended not merely to cases in which the title of the purchaser for valuable consideration without notice was impeached by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims, where such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected with *reasonable diligence*.”

What will amount to this “reasonable diligence,” and when the purchaser will be affected by constructive notice, will depend on the circumstances of each case.

Opinion of the Court—Hoffman, J.

[June,

“It is scarcely possible,” says Vice-Chancellor Wigram, “to declare, *a priori*, what shall be deemed constructive notice, because unquestionably that which will not affect one man may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy for my present purpose, and without danger, assert that cases in which constructive notice has been established resolve themselves into two classes, first: * * * * and secondly: where the Court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice.” * * * *

“The proposition of law upon which the second class of cases proceeds is, not that the party had incautiously neglected to make inquiries, but that *he had designedly abstained from such inquiries for the purpose of avoiding knowledge—a purpose which, if proved, would clearly show that he had suspicion of the truth, and a fraudulent determination not to learn it.* If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind—if mere *want of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to the purchaser*, there the doctrine of constructive notice will not apply; there the purchaser will be considered, as in fact he is, a *bona fide* purchaser without notice.” (1 Hare, 55, cited; 2 Tud. & White’s Leading Cas. in Eq.; Hare & Wallace, notes.) [The *italics* are the Editors.]

The same principles are recognized by the Supreme Court of the United States in the last decision on this subject.

In *Wilson v. Hall*, the Court says: “On this point, we need only refer to Sugden on Vendors (p. 622), where he says: ‘In *Ware v. Lord Egmont*, the Lord Chancellor Cranworth expressed his entire concurrence in what on many occasions of late years had fallen from Judges of great eminence on the subject of constructive notice, namely: that it was highly inexpedient for Courts of Equity to extend the doctrine. When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as to enable the Court to say, not only that

1870.]

Opinion of the Court—Hoffman, J.

he *might* have acquired, but also that he *ought* to have acquired it, but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is, not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether the not obtaining it was an act of *gross or culpable negligence.*'” (6 Wallace R. 91.)

The doctrine of constructive notice has unquestionably been carried, in some of the cases, further than the principles above laid down would warrant. They would probably at the present day be otherwise decided.

In general, it may be said, that whatever is sufficient to put a person upon inquiry, is good notice; that is, where a man has sufficient information to lead him to a fact, he shall be deemed cognizant of it.

Thus, the direct statement to a purchaser, of an adverse claim, by the party holding it, or by any one acting in his behalf, will take effect as actual notice. But it must be sufficiently definite to put the purchaser on his guard, and enable him to ascertain whether it is authentic. (4 Cushman, 312; *Flagg v. Mann*, 2 Sum. 552.)

But mere reports and allegations, incapable of being traced to any definite source, vague and general assertions, resting on mere hearsay, and made by strangers, may be wholly disregarded. (25 Maine, 484.)

It has even been said that the notice will not be binding, unless it proceeds from a person interested in the property, and in the course of a treaty for its purchase. (2 Sugd. on Vend. 451-2; *Barnhart v. Greenshields*, 28 Eng. Law and Eq. p. 77.)

So, also, where the purchaser knows that the legal estate is in a third person, he is bound to take notice of what the trust is. (Freem. Ch. Cas. C. 171.) Or, if he knows that the title deeds are in another man's possession, and he omits all inquiries as to the deeds, he will be held to have notice of any claim of the party holding them. (9 Hare, 458; 11 Juv. 527; 2 L. Cas. in Eq. p. 139.) So, too, if the purchaser knows the estate to be in the occupation of an-

Opinion of the Court—Hoffman, J.

[June,

other than the vendor, he is bound by the equities which the party in possession may have in the land. (*Taylor v. Lebbat*, 2 Ves. Jur. 439; *Jones v. Smith*, 1 Hare, 60.)

So, too, "where the purchaser cannot make out title but by deed which leads him to another fact, he shall be presumed cognizant thereof, for it is *crassa negligentia* that he sought not after it." (*Moore v. Bennet*, 2 Ch. Cas. 246.)

It is also said to be well established, that "a purchaser will have constructive notice of anything which appears in any part of the deeds or instruments which prove and constitute the title purchased, and is of such a nature, that if brought directly to his knowledge, would amount to actual notice," and the rule is said to be the same with regard to grants made by the public as to those made by individuals, and a party claiming title originating in a patent from the State, will be held to have notice of everything that appears on the face of the patent. (2 Lead. Cas. in Eq. p. 169; citing *Brush v. Ware*, 15 Pet. 93.)

In that case, the contest was between the real owner of a land warrant and a purchaser of the warrant under a fraudulent executor's sale, who had subsequently obtained a patent.

The Court held that, in purchasing the warrant, he had merely acquired an equity, and that the recital on the face of the warrant of the assignment by the executor put him on inquiry to inspect the will, and ascertain the validity of the assignment, and that the issuance of the patent by the ministerial officers of the government did not better his position.

What would have been the rights of a purchaser for value without actual notice from the patentee in possession, was not considered.

From the foregoing it may be gathered "that although to deprive a purchaser of protection as a *bona fide* purchaser without notice, he must be proved to have acted fraudulently, or to have been guilty of gross or culpable negligence, yet that the failure to take certain well established and reasonable precautions—such as a thorough examination of title papers, a search of the records, an inquiry into the

1870.]

Opinion of the Court—Hoffman, J.

rights of those in actual possession—will be treated as gross negligence, and will make the purchaser liable for all the consequences of omissions, which are equally injurious whether they proceed from laches or design. (2 Lead. Cas. in Eq. 163.)

Such being the general principles applicable to this case, we will proceed to consider the questions presented by it.

1. Did the recitals in the patent that the claim was derived from a Mexican grant; that it had been confirmed by the Board and the District Court, and that the patent did not affect the rights of third persons, affect the defendants, who purchased for full value from the patentees, in actual and undisputed possession, with notice of the transcript and records of the Board and of the District Court, and of the proceedings in the Probate Court, and the administrator's sale, which those records described?

2d. If so, were they bound to take notice of the invalidity of those proceedings, and that the administrator's deed was a nullity, and was their failure to learn that fact an act of *crassa negligentia*, or "an omission to take a reasonable and well established precaution," which may be treated as equivalent thereto?

The cases of *Estrada v. Murphy*, 19 Cal. 250; *Salmon v. Symonds*, 30 Cal. 301; and *Wilson v. Castro*, 31 Cal. 420, are cited in support of the affirmative of the above propositions.

But in neither of these cases did the questions here presented arise.

Estrada v. Murphy merely holds that where a conferee, in presenting his claim acts as agent, trustee, guardian, or in any other fiduciary capacity, equity will compel a transfer of the legal estate to the equitable owner, and will control the legal title in the hands of the patentee, so as to protect the just right of others. *Salmon v. Symonds* decides that patentees who did not own or claim to own but a portion of a rancho for which they presented their claim, but who have obtained a patent for the whole, will be decreed to hold the legal title for the part not owned by them in trust for the owner. In *Wilson v. Castro*, it was held that where the

Opinion of the Court—Hoffman, J.[June,

widow of a deceased Mexican grantee, together with her second husband, conveyed the lands granted to a purchaser, who presented his claim and obtained a patent, equity will raise a constructive trust in favor of the heirs of the deceased grantee.

But the Court is careful to withhold any expression of opinion as to what, under such circumstances, would be the rights of a purchaser from the patentee without actual notice.

It has already been observed that in *Brush v. Ware*, (15 Pet. 111) the contest was between the patentee and the real owners of the warrant under which the patent issued. The rights of the *bona fide* purchasers from the patentee were not in question. The law on the points under consideration being thus found not to have been settled by authority, must be determined upon principle.

If the purchaser from the patentees was bound to look at the record of the proceedings before the Board, and the District Court, and the deeds it referred to, and was affected with notice of every defect in the deraignment of the title of the patentees, it can only be because no greater effect is attributed to the adjudication of the Courts that the patentees had established a valid claim to the land, than would be given to a declaration to that effect by an ordinary vendor.

The adjudication would, in that case, merely amount to a judicial determination that the original Mexican grant was valid, but would have no effect to raise a presumption that the confirmer was entitled to the patent, strong enough to protect a purchaser from him without notice, or to prevent the failure of the latter to investigate the derivative title from being an act of gross and culpable negligence.

Such is not, in my opinion, a just construction of the provisions of the Act of 1851, under which the patent issued.

By the eighth section of that Act, "each and every person claiming lands by virtue of *any* right or *title derived* from the Spanish or Mexican government, was required to present the same," etc. By sec. 13, "all lands, the claims to which shall not have been presented to the said Commis-

1870.]

Opinion of the Court—Hoffman, J.

sioners within two years after the date of the Act, are to be deemed, held and considered as part of the public domain of the United States.

A subsequent clause in the same section provides for the issuance of an injunction by the District Judge to restrain the confirnee from suing out a patent, when his title to the lands confirmed is disputed by any other person.

It will be seen from these provisions that the duty of the Board, and of the District and Supreme Courts, on appeal, was not merely to inquire into the validity of the original grant, but into the validity of the claim of the claimant. If the latter failed to establish, *prima facie* at least, his derivative title, his claim must be rejected.

In practice, the claims were in general presented in the names of the owners, and not of the original grantees, in cases where the latter had conveyed the whole or a portion of the ranchos; and it has occasionally happened that a claim for a part of a rancho has been duly presented and confirmed, while the remainder has become public land by reason of the non-presentation of any claim for it.

It was, therefore, the duty of the law agent, the District Attorney, and the Attorney-General, and of the Board and the Courts, to look into the mesne conveyances to a certain extent at least; first, in order that the patent might not issue, except to one presumptively entitled to it; and second, because if the claimants' title could be shown to be invalid, and no other claim had been presented, the land would become a part of the public domain.

The provision in the thirteenth section, for an injunction to restrain the confirnee from suing out a patent, seems to recognize that the issuing of a patent might confer some rights, and raise to some extent a presumption in favor of his title. The form of decree sanctioned by the Supreme Court, in cases where the derivative title of the claimant was doubtful, seems also a recognition of the same fact.

In those cases, the claim was confirmed to the claimants, or whoever might be the lawful successor in interest of the original grantee.

To what end insert this saving clause, if the adjudication

Opinion of the Court—Hoffman, J.

[June,

in favor of the claimant was so mere a nullity, that not even a *bona fide* purchaser of the legal title, without actual notice, would be relieved of the imputation of gross negligence if he omitted to search into the derivative title, and if he failed to discover flaws in it which had escaped the notice of the law officers of the United States, and even of the Supreme Court itself?

Nor are the observations of the Supreme Court, in *Castro v. Hendricks* (23 How. 441), when properly understood, inconsistent with this view.

The Court says: "The mesne conveyances were also required, but not for any aim of submitting their operation and validity to the Board, but simply to enable the Board to determine if there was a *bona fide* claimant before it under a Mexican grant; and so this Court has frequently decided that the government had no interest in the contest between persons claiming *ex post facto* the grant."

The Supreme Court could not, of course, have meant that the Government had no interest in showing that the derivative title of the claimant was wholly void; for by so doing, the rejection of the claim must have followed, and the lands would in many instances have been secured to the public. All that the court meant to declare was, that the United States had no interest in contests *inter partes*; that their rights were not submitted to the Board, and could not be *finally* adjudicated, for contestants were not permitted to intervene in the proceeding (except by way of injunction, as provided for in the thirteenth section), and the decision of the Board was declared by law not to affect the rights of third persons. The true meaning of the Court is, doubtless, that attributed to it by Mr. Justice Baldwin, in *Estrada v. Murphy* (19 Cal. 274.) "It would seem to follow," says the learned Judge, "from these and not less decisive intimations, in other cases in the Supreme Court of the United States, that the mere fact that a particular person obtained a patent from the Government, was not *conclusive* of his exclusive right, but that it might be shown in a proper proceeding that others were interested or had a better right."

In the opinion delivered by Mr. Justice Field, when over-

1870.]

Opinion of the Court—Hoffman, J.

ruling the demurrer in this case, it is said: "It (the patent) is evidence that the title had passed by grant from the former government, or that such equities had existed under the former government in favor of the alleged grantee as to require or justify the cession of the title, and also, that by conveyances regular on their face, the legal title had apparently passed from the grantee to the claimants; but it is not evidence of any equitable relations of the holders of subsequent conveyances from the grantee to each other, for such relations were not submitted to the tribunals of the United States for adjudication."

From the foregoing it results, that a confirmation and patent establish:

1st. That the original grant was valid, and

2d. That the patentee has been found to be a *bona fide* claimant under the grant, and that, by a deraignment of title regular on its face and *prima facie* valid, he has shown himself to be entitled to a conveyance by the United States of the legal title.

The purchaser, therefore, from the patentee, without actual notice, has a right to assume the existence of these facts thus judicially established. He cannot be charged with gross negligence, willful ignorance, or even neglect of a reasonable and well established precaution, if he has acted upon the belief, that in the mesne conveyances adjudged to be regular and apparently translativ^e of title, there would not be found a deed void on its face, because it was the result of a legal proceeding which was an absolute nullity.

In charging every patentee with a constructive trust in favor of the successor in interest of the grantee, who has failed to present his claim, irrespective of any question of notice, good faith, or any fiduciary relation towards the latter, the Supreme Court of the State has gone as far as either principle or sound policy will permit. The doctrine of constructive notice should not, in my judgment, be extended contrary to the tendency and spirit of the recent decisions to a new class of cases. It is essential to the security and repose of a vast number of fairly acquired titles in this

Opinion of the Court—Hoffman, J.

[June,

State, that the rights of the purchaser who, without actual notice, has obtained the legal title from the United States under a patent, should be firmly upheld.

It is well settled, that even where a purchaser is put on inquiry, all that can be exacted of him is a diligent effort to ascertain whether the purchase will prejudice the equitable rights of others; when such an attempt has been made, and it appears that further efforts would have been fruitless, the purchaser's duty is discharged. (*Williamson v. Brown*, 15 N. Y. 354; 2 Lead. Cas. in Eq. 154.)

In this case, no examination of the record would have in fact apprised the purchaser that the Probate Court was without jurisdiction over the estate of the deceased. One of the defendants swears that he consulted a lawyer, who advised him that the purchase was safe, and such would very possibly have been the opinion of a large number of the profession.

The decision of the Supreme Court, that the Probate Court was without jurisdiction, was not promulgated until several years later.

So far, then, as the doctrine of constructive notice rests upon voluntary ignorance or willful blindness, or any moral delinquency whatever, it cannot apply to these defendants: for they had practically and in point of fact no means of ascertaining the fact, with constructive notice, of which they are now sought to be charged. If the case of *Jones v. Powles*, above cited, be law, and if a purchaser of an estate claimed under a forged will, will be protected by the subsequent acquisition of the bare legal title, on the ground, that the falsehood of the asserted fact of title could not have been detected by reasonable diligence, *a fortiori* must these defendants be protected: for no diligence would have enabled them to discover the defects in the title, unless, in advance of the public and many of the legal profession, and with greater acuteness than was exhibited by the judicial authorities of the United States, they had anticipated a decision of the Supreme Court of this State upon a novel and perhaps doubtful question of law. Nor could they suspect, that by acquiring the legal title, they were prejudicing the

1870.]

Opinion of the Court—Hoffman, J.

equitable rights of others: for no heirs had appeared to claim the inheritance for more than ten years, and none were known to exist. And besides, their rights as against the United States had long since been lost, by their failure to present their claim: for the act of 1851 makes no exception in favor of absentees, minors, or *femmes covert*.

The only party that could have been injured by the presentation of the invalid claim was the United States—and they by a solemn adjudication, final and conclusive as between them and the claimants, had adjudged the claim to be valid, and had issued a patent for the land.

Nor in considering the hardships of this and similar cases, and the comparative equities of the complainants and defendants, is it to be forgotten that but for the proceedings now claimed to have been fraudulent and invalid, no claim would have been presented for this vacant inheritance, and it would long since have been disposed of as public land.

The complainants therefor seek to avail themselves of the acts of the patentees who presented the claim, obtained a confirmation, and procured a patent. It is but just that their rights should be postponed to those who, in good faith and relying upon a deed from the government, the paramount source of title, have paid their money, occupied and improved the land, and for many years have established their homes upon it.

No distinction can, I think, be drawn in this case between those who purchased after confirmation and before patent issued, and those who purchased subsequent to the patent. Both hold the legal title, derived from the United States, under the patent—and both have the equitable right to protection.

Under this view, it becomes unnecessary to consider the other important questions of fact and of law presented by the case.

The bill must be dismissed.

Opinion of the Court—Deady, J.

[June,

JOHN LAMB, AND EMMA, *his wife*, AND IDA SQUIRES,
v. T. J. CARTER, ISAAC B. SMITH, J. P. O.
LOWNSDALE, MILLARD O. LOWNSDALE, RUTH A.
LOWNSDALE AND MARY E. COOPER.

CIRCUIT COURT, DISTRICT OF OREGON,
JUNE 28, 1870.

1. SALE AND COVENANT TO MAKE TITLE AN ESTOPPEL IN EQUITY.—On February 26, 1860, Daniel H. Lownsdale, being the owner of an undivided interest in the west half of the Portland land claim, including Block 258, in said city, commonly called the Nancy Lownsdale tract, under the Donation Act of September 27, 1850 (9 Stat. 497), executed a bond in the penal sum of \$700 conditioned as follows: Whereas, I have this day sold, released and quitclaimed unto Robbins, his heirs and assigns, etc., all that piece or parcel of land, described by metes and bounds, the same being Block 258 aforesaid; and, whereas, said Robbins has made his promissory note to said Lownsdale, or order for the balance of the purchase money, payable in twelve months from date; “Now, know ye also, that if said note shall be truly paid, and I, the said bounden Lownsdale, shall give unto said Robbins a good and sufficient title to said land according to these presents, and such further confirmation as the title from the United States may vest in me, then this obligation to be null and void; otherwise,” etc.: *Held*, that such instrument was in effect a contract of sale of Lownsdale’s interest in the Block 258, and also a covenant to make a good title to the whole land contained therein, and that the heirs of said Lownsdale were thereby estopped in equity from asserting any interest in said block, as such heirs.
2. SAME.—ESTOPPEL.—Under a decree partitioning that portion of the Portland land claim, called the Nancy Lownsdale tract, between her children and the heirs and vendees therein of Daniel H. Lownsdale—three fifths to the former and two fifths to the latter in gross—the heirs of said Daniel H. can only claim as heirs, and not as purchasers, and are therefore estopped to claim any interest thereby in any specific portion of said two fifths against the agreement or covenant of their ancestor, the same as he would be, if living.

Before DEADY, District Judge.

W. Lair Hill, for complainant.

Charles Gardener, for defendants.

DEADY, J. This suit was brought December 31, 1869, for a partition of Block 258 in the city of Portland, and for

1870.]

Opinion of the Court—Deady, J.

an adjustment of a lien thereon for owelty, heretofore paid by certain of the defendants in a suit for partition of a tract of land including the premises, between the children of Nancy Lownsdale and the heirs and vendees of her husband Daniel H. Lownsdale. The plaintiffs, John R. Lamb and Emma, his wife, and Ida Squires, her sister, are citizens of Kentucky. The defendants are citizens of Oregon; and except T. J. Carter and Isaac B. Smith, are united in interest with the plaintiffs, and make no defense to the bill. The defendants, Carter and Smith, demur to the bill, and for cause of demurrer assign, substantially, that the plaintiffs have no interest in the premises.

From the bill it appears that Daniel H. in his lifetime, and at and after September 27, 1850, occupied a certain tract of land upon which the city of Portland is partially built, and which includes the premises in controversy, as a settler, under the Donation Act of September 27, 1850 (9 *Stat.* 497); and that on April 15, 1854, Nancy, the wife of Daniel H., died intestate, leaving said Daniel H. and William Gillihan and Isabella Ellen Gillihan, her children by a former husband, and Millard O. and Ruth A. Lownsdale, her children by Daniel H., surviving her; and that afterwards, in pursuance of said Donation Act, the west half of said tract, being about ninety acres, and now commonly known as the "Nancy Lownsdale tract," and embracing the premises in controversy, was duly set apart by the proper officers of the United States Land Office to said Nancy; and that on June 6, 1865, the United States issued a patent purporting to grant said Nancy Lownsdale tract, including said Block 258, to the said Nancy and her heirs in fee simple. That upon the death of said Nancy, said Daniel H., by operation of said Donation Act, became seized of an undivided one fifth of said tract, and her children aforesaid of an undivided one fifth thereof each, in fee simple; and that on January 27, 1860, the said Daniel H. became the owner by purchase of the aforesaid one fifth of Isabella Ellen Gillihan, then married to William Potter.

That on February 14, 1860, said Daniel H. conveyed an undivided two fifths of the aforesaid one fifth purchased

Opinion of the Court—Deady, J.

[June,

from said Isabella Ellen, to Hannah M. Smith; and that on February 26, 1861, he executed and delivered to George C. Robbins, a bond for a deed to his undivided interest in said Block 258; and that on November 8, 1861, said Robbins sold his interest in said block, and duly assigned said bond to the defendant Smith.

That on May 4, 1862, said Daniel H. died intestate, leaving the plaintiffs, Emma Lamb and Ida Squires, and the defendants, J. P. O. Lownsdale, Ruth A. Lownsdale and Mary E. Cooper his only heirs at law, the said Emma and Ida being the children of Sarah M. Squires, a deceased daughter of said Daniel H., and the others being his children.

That on May 22 and August 12, 1865, in a suit brought for the partition of said Nancy Lownsdale tract by said William Gillilan against said Isaac B. Smith and others, including all the parties hereto, except T. J. Carter, decrees for partition and payment of owelty were duly given by the Circuit Court of the State, and for the county of Multnomah; and that by said decree it was determined that two fifths of said tract had belonged to said Daniel H. in his lifetime, and that the other three fifths belonged to said William Gillihan and Millard O. and Ruth A. Lownsdale; and that certain portions of said tract were set apart in severalty to said William, Millard O. and Ruth A., and the remainder of said tract was set apart in gross to the heirs or vendees of said D. H. L., according to their respective interests, whatever they might be; and because of the inequality in quantity and value of such partition as between the children of Nancy Lownsdale and the heirs and vendees of Daniel H., said Circuit Court by its decree provided that the portion or parcels allotted to the latter should pay to the former the gross sum of \$39,156.02 owelty, to be distributed among said parcels, in proportion to their respective value, and that \$1,259.61 of said sum was assessed upon said Block 258, and made a lien thereon, which amount the said defendant Smith afterwards paid with interest.

The effect of this partition upon the ownership of the parcels

1870.]

Opinion of the Court—Deady, J.

allotted to the heirs or vendees of Daniel H. was duly considered by this Court in *Fields v. Squires*, (Deady, R. 391.) It was then held that the three fifths interest in any particular parcel of which the children of Nancy were divested by the decree of partition, was by the same means vested in the heirs of Daniel H., and not in his previous vendees of all or any portion of said parcel. In other words, the heirs of Daniel H. gave up their two fifths interest in the parcels allotted to the children of Nancy, and received in exchange therefor the three fifths interest of the children in the remaining parcels or portion of the tract, and because of inequality of such partition, the owelty was given to such children, and made a lien upon such three fifths interest as a security for its payment.

The vendees of Daniel H. neither gained nor lost by the partition. Neither did his heirs, unless by some covenant of their ancestor, they should be estopped to claim this three-fifths interest in some particular parcel or block which was allotted to them in exchange for their two fifths interest in the portions of the tract allotted to the children of Nancy. As Daniel H. only had two fifths interest in the Nancy tract, when he sold or conveyed away any specific portion of it—as block 258—the purchaser by means of such sale, release, or quit claim only acquired such two fifths of such parcel.

It also appears that the interest conveyed by Daniel H. to Hannah M. Smith, was on February 13, 1869, purchased by the defendant J. P. O. Lownsdale, from said Hannah and Hiram, her husband; and that the defendant Carter has become the assignee and grantee of the interest acquired by Isaac B. Smith in the east half of the premises, to wit: lots 1, 2, 3, and 4.

Upon this state of facts, the plaintiffs claim that the defendants Smith and Carter as assignees of Robbins; are entitled in equity to the interest which Daniel H. had in this block at the date of the bond to Robbins, which was eight twenty-fifths, and that J. P. O. Lownsdale is entitled to the interest conveyed to Hannah M. Smith, which was two twenty-fifths, but that the remaining three fifths belonged to

Opinion of the Court—Deady, J.[June,

the heirs of Daniel H., and was acquired by them after the death of their ancestor in exchange for their two fifth interest in other portions of the Nancy Lownsdale tract, allotted to the children of said Nancy.

The defendants, Smith and Carter, rest their denial of any interest of the plaintiffs in the premises upon the legal effect of the bond of their ancestor to Robbins, and maintain that the question turns upon the proper construction to be given to that instrument.

The bond is in the usual form, and in the penal sum of \$700, conditioned as follows: "Whereas, I have this day sold, released and quitclaimed unto Robbins, his heirs, assigns, etc., all that piece or parcel of land within the incorporated limits of the city of Portland, etc., and particularly described as follows—(here follows a description of the premises in controversy by metes and bounds)—Together with all and singular, the appurtenances thereunto belonging, to their own use and benefit forever."

Then follows a statement of the consideration of the sale, to the effect that \$600 was paid in hand, and that the remaining \$100 was to be paid in twelve months, according to the tenor of a certain promissory note of said Robbins, payable to said Lownsdale order, and recited at length in the condition.

"Now know ye also that if said note shall (*not*) be truly paid, and I, the said bounden Lownsdale, shall give unto the said George C. Robbins a good and sufficient title to said piece of land according to these presents, and such further confirmation as the title from the United States may vest in me, then this obligation shall be null and void, otherwise to remain in full force and virtue."

On the argument, it was admitted by counsel for the plaintiff that the word *not*, in the condition of the bond, (which I have enclosed in brackets) is a clerical mistake, and should be rejected by the Court as mere surplusage.

Stripped of its excessive verbiage and awkward use of technicalities, the intention and legal effect of this instrument are apparent. It is a contract of sale, with an agreement or covenant, under a penalty equal to the purchase

1870.]

Opinion of the Court—Deady, J.

money, upon the part of the vendor, *to make title to the thing sold*, upon the payment of the remaining \$100 of the purchase money. The sale, release and quitclaim of Block 258 did not of itself give the purchaser, Robbins, any interest or right to an interest therein, beyond the 8-25 then owned by Daniel H. But if the latter, in addition to the sale, etc., also covenanted with Robbins or his assigns, to make him or them a good and sufficient title to the said piece of land, then he and those claiming under him are estopped to claim anything in the premises to the contrary.

That is this case: the condition of this bond contains in legal effect an agreement or covenant upon the part of Daniel H. with Robbins and his assigns, to make the latter a good and sufficient title, not merely to his present interest in the premises, but to the *said piece of land*.

Two objections were made in the argument of counsel for plaintiffs to this construction of the condition of the bond. First, that the covenant therein of Daniel H. only bound him to make title to the premises *according to these presents*, and that *according to these presents* must be construed to mean according to the terms of the sale, that is—*sold, released and quitclaimed*, and as only 8.25 were *sold*, etc., then the covenant for title would not extend to the subsequently acquired three fifths interest. The result of this construction would give the words, *according to these presents*, the effect to qualify the general covenant for title into a mere covenant for title to the interest which Daniel H. then had, be it more or less.

It seems to me that this would be to disregard the plain intention of the parties, as expressed in the writing, and that, too, by giving a strained effect to a mere formal phrase which was probably inserted in the instrument as a mere matter of form. If it has any significance, it can mean nothing more or less than *according to the terms of this instrument*. Now, what are the terms of the instrument? That Robbins had purchased the piece of land in question and paid \$600 of the purchase money, and was to pay \$100 more, upon the payment of which last sum, Daniel H. was to make Robbins or his assigns a good and sufficient title to said

piece of land. The second ground of objection is, that the covenant to make "such further confirmation as the title from the United States may vest in me," is inconsistent with the idea, that Daniel H. was then the sole owner of the property and intended to covenant to make title to the whole interest therein. I do not see the force of the objection. Besides, if we are to indulge in conjectures upon this subject, it will readily occur to any one who will consider the circumstances, that Daniel H. being the owner of a two fifths undivided interest in a large tract of land, might sell a small parcel thereof by metes and bounds, and covenant to make a good title thereto, upon the reasonable expectation, that in the partition with his deceased wife's children he could and would arrange to have such small parcel allotted to himself in severalty. The reason for inserting the covenant concerning the title of the United States was probably this: At the date of the transaction, the patent for the land had not been issued, and it is likely that Daniel H. or Robbins, or both of them, had some impression, that when the patent did issue to Daniel H., as expected, it would be prudent or necessary for the latter to *confirm* any title which he might have made to the premises before the issue of the patent.

In the disposition of other cases heretofore decided in this Court, which involved the question as to the effect of this partition between the children of Nancy and the heirs and vendees of Daniel H., it was assumed, without particular investigation or argument, that the children of Daniel H. took the three fifths interest which was allowed to them in sundry blocks or parcels of the whole tract, for instance—as in block 258—as his heirs, and were therefore bound by his acts or covenants in relation to such blocks or parcels. The correctness of this conclusion is now questioned by counsel, and it is suggested, that the children of Daniel H. received three fifths interest in any of these particular blocks or parcels allotted to them, not from their father, but from the children of Nancy, in exchange for the two fifths interest which they owned elsewhere in the general tract and surrendered to the children of Nancy.

As the question has not now been specially argued, I will

simply state the ground upon which it appears to me that the children of Daniel H. ought to be considered as taking this three fifths interest as his heirs, and leave it open for further consideration whenever it may arise.

The undivided interest of the children of Daniel H. in the Nancy tract being *inherited* from him, its character in this respect was not changed by the partition and allotment. In the partition suit, these children claimed as the heirs of Daniel H., and whatever was allotted to them as his heirs, they hold or claim as his heirs. They acquired no new title by the partition, but only ascertained by means of the judicial proceedings in what portion of the general tract their particular interest was. In contemplation of law, the particular tract allotted to them by the decree of partition was the *very land* which they inherited from their ancestor. Before that time, being tenants in common, as Blackstone says, "they all occupy promiscuously," "because none knoweth his own severalty." (2 Black. Com. 191.)

It appearing, then, that in equity, the plaintiffs are estopped to claim any interest in the block in controversy, as against the defendants Smith and Carter, on account of the covenant of their ancestor to make a good and sufficient title to the same, their demurrer to the bill is sustained.

UNITED STATES v. ROBINSON *et al.**

CIRCUIT COURT, DISTRICT OF CALIFORNIA,
JULY 8, 1870.

1. **USAGE PROVED.**—A usage in the grain trade in California to deliver barley in sacks may be shown, when nothing is said in the contract as to the mode of delivery.
2. **BREACH OF ENTIRE CONTRACT.**—Where a vendor of grain, bound by the contract to deliver from time to time upon requisitions made by the purchaser, refuses to deliver upon requisitions made in pursuance of the contract, and notifies the purchaser that he regards the contract as rescinded, and that he will deliver no more grain under it, the purchaser may treat the contract as wholly broken, and sue for, and recover, the damages upon the entire contract, without making further requisitions.

* This judgment was affirmed by the Supreme Court at the December term, 1871, (13 Wall. 343.)

Statement of the Case.

[July,

Before SAWYER, Circuit Judge.

ACTION for breach of contract to deliver barley.

The defendants agreed to deliver upon the requisitions of the United States Quartermaster, at certain military posts in the vicinity of San Francisco, at such times within the year, and in such quantities as required for the use of such posts, not exceeding in the aggregate one million pounds. The contract did not specify the mode of delivery, whether in sacks, in bulk, or otherwise. It was stipulated that the United States should pay a specified sum per pound in gold coin; and on failure to deliver in accordance with the requisitions made under the contract, that the quartermaster might purchase the required amount in open market, and charge the defendants the difference between the contract price and the price so paid. The requisitions were made and duly filled from time to time for a period of six months, the delivery being always made in sacks. Afterward another requisition of thirty thousand pounds of barley was made, to be delivered at the Presidio on the tenth of January following. The defendants brought the barley to the wharf, some six hundred yards from the Presidio, in sacks, emptied it into wagons, hauled it to the Presidio and tendered it in bulk. The post quartermaster, having no facilities for storing in bulk, declined to receive it in that form, and insisted that under the general usage of the trade in California, he was entitled to have it delivered in sacks. Defendants declined to deliver in sacks, and hauled the barley away. They then addressed the quartermaster a note, stating that they regarded the contract as rescinded, and that they would deliver no more barley under it. The quartermaster notified the defendants, in writing, that he should hold them to the contract, and that if they did not furnish the barley, he would purchase in open market and charge them with the increased cost. Defendants neither delivered, nor tendered any more barley; and the quartermaster, thereupon, from time to time purchased in open market, at a considerably higher price than that stipulated in the contract, barley having before the requisition to be filled on the tenth of January, risen largely

1870.]

Opinion of the Court—Sawyer, J.

in price. On the trial the defendants objected to any proof of a usage to deliver in sacks, nothing having been said in the contract as to the mode of delivery. They also insisted, that no recovery could be had except for the requisitions actually made; that notwithstanding their notice that they would deliver no more barley, the quartermaster was bound to make requisitions from time to time, as the barley was wanted, and that plaintiff could only recover for the requisitions so actually made.

L. D. Latimer, U. S. District Attorney, for plaintiff.

J. B. Felton, for defendants.

SAWYER, Circuit Judge. The first question in this case is, whether it is competent to show a usage in the grain trade in California to deliver grain in sacks, nothing being said in the contract as to whether it is to be delivered in bulk or in sacks. I am satisfied from the authorities, that the testimony is admissible. The cases cited in the note to *Wigglesworth v. Dallison* (1 Smith's Lead. Ca., 5th Am. Ed., page 305), clearly establish this rule. In a case there cited, Baron Parke says: "It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, on matters with respect to which they are silent. The same rule has been applied to contracts in other transactions of life in which known usages have been established and prevailed, and this has been done on the principle of presumption, that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to these known usages." So another learned Judge cited, in the notes at page 308, *Id.*, says: In all contracts "as to the subject matter of which known usages prevail, parties are found to proceed with the tacit assumption of those usages; they commonly reduce into writing the special particulars of their contract, but omit to specify those known usages which are included, however, as, of course, by mutual understanding. The contract is in truth partly expressed in writing,

partly implied and unwritten." So at page 309, note a, *Id.*, the learned editors of the *American Notes* well state the rule thus: "In like manner, where there has been an express contract about a matter concerning which there is an established custom, this custom is reasonably to be understood as forming a part of the contract, and may be referred to to show the intention of the parties in those particulars which are not expressed in the contract. And it is obvious that the reason of the rule which forbids the receipt of parol evidence of the intention of the parties for the purpose of adding to a written contract, has no application to the evidence of custom." In one case, *Smith v. Wilson* (3 B. and Ad. 728), the Court went so far as to permit the custom of a particular place to be shown—that 1,000 rabbits meant 1,200 rabbits. But it is not necessary to go to that extent here; for in that case, there would seem to be a custom shown contrary to the express terms of the contract. In this case there is nothing in the contract in terms inconsistent with the usage shown. The most that can be said is, that the testimony annexes an incident to the contract in a matter respecting which the contract itself is silent. It merely discloses the circumstances surrounding, and the well known incidents connected with, the subject matter, at the time of entering into the contract, and in view of which it is to be presumed the contract was made. (See other authorities cited in note to *Wigglesworth v. Dallison*; also, *Marcy v. Whaling Insurance Co.*, 9 Met. 363.) I think the evidence of usage to deliver in sacks, when not otherwise expressly provided in the contract, admissible, and being admitted, the usage was clearly established, there being no contradictory evidence. The general usage being established, the defendants must be presumed to have been cognizant of it, and to have contracted with reference to it. But I think, also, that the evidence and acts of the parties justify the inference that the contractors well understood the usage. They at least, in fact, voluntarily conformed to it during the first half of the year over which the contract extended. I also think, that the refusal to deliver in sacks, and the subsequent notice to Major Hoyt, United States Army

1870.]

Opinion of the Court—Sawyer, J.

Quartermaster, that they would deliver no more barley under the contract, but should regard the contract as rescinded, a breach of the entire contract at that time, and that nothing more was required to be done on the part of the plaintiff after the continued failure to deliver the barley referred to, in January, to entitle the United States to recover, than was done in the matter by Major Hoyt. (*Hale v. Trout*, 35 Cal. 230, and cases there cited.) This case is sought to be distinguished from *Hale v. Trout*, because, in that case, the amount of lumber to be delivered was fixed, while here the defendants, Robinson & Co., might not be called upon to deliver the whole million pounds of barley; and, it is claimed, that it was necessary to make the requisitions from time to time in order to fix the amount. But this, I apprehend, does not affect the principle. The defendants had notified plaintiff that they “decline to furnish any more barley to the government under the contract,” and they never did deliver the barley mentioned in the January requisitions. It would be a vain thing after this to continue to make requisitions. They were to furnish all required for certain posts, not exceeding a specified amount. They had already declined to furnish any more under the contract, and had been notified that they would be held to the contract, and that the necessary amount of barley, etc., would be purchased in open market and the difference in cost charged to them. They did not afterward notify the agents of the government of any intention to recede from the determination not to furnish more barley. I think there was a total breach of the contract. (See also *Withers v. Reynolds*, 2 B. and Ad. 882; *Franklin v. Miller*, 4 Ad. and Ell. 599.)

The plaintiff, in my opinion, is entitled to judgment for \$4,048.16 in gold coin.

In re A. B. GALLINGER IN BANKRUPTCY.

DISTRICT COURT, DISTRICT OF CALIFORNIA,
JULY 18, 1870.

1. BANKRUPTCY.—CREDITORS' PETITION MAY BE AMENDED.—Where the proofs disclose acts of bankruptcy not averred in the petition of the creditor, the petition may be amended so as to conform to the proofs.

Before HOFFMAN, District Judge.

W. H. Rhodes, attorney for petitioning creditor.

A. Rosenbaum, attorney for alleged bankrupt.

HOFFMAN, J. A petition having been filed against the above-named party, praying that he be adjudged an involuntary bankrupt, the matter was referred to the Register, to take proofs, and report the same, with his opinion, to the Court. The report has accordingly been made, and the case now comes up on exceptions filed on behalf of the alleged bankrupt.

The facts, as disclosed by the proofs, seem sufficiently plain. Towards the end of the year 1868, Gallinger, who was a wholesale dealer in wines and liquors, in the town of Oroville, procured from various persons in this city, goods to the amount of \$10,000. What representations he made as to his means of payment, does not appear; but he admits that he stated that he had \$10,000 in notes due to him from Chinamen. He denies that he said they were good, but unless he meant it to be so understood, it is difficult to imagine his motive for making any statement on the subject.

Towards the end of December, he wrote to his creditors in this city that he was unable to meet his liabilities, and advised them to send to Oroville to collect what they could. His whole stock of goods remaining in his store at this time was worth only \$4,000, including the furniture and fixtures.

On the thirtieth or thirty-first of December, an attachment was levied, on behalf of Wurmser, one of his San Francisco creditors, on this stock. On the same day, at an earlier hour, an attachment had been levied on the same

1870.]

Opinion of the Court—Hoffman, J.

goods, for a small sum, at the suit of one Brock, a creditor in Oroville. At the solicitation of Brock, who admits that he was apprehensive that his lien might be defeated by proceedings in bankruptcy, he signed a paper which is not produced, but which authorized a judgment to be entered up against him at once and before the time for answering had expired or his default was due. The goods were subsequently sold under this judgment and that obtained by the San Francisco attaching creditor.

The only account given by Gallinger of the proceeds of the goods bought by him in San Francisco is, that he paid to one Kasel, \$3,000; to Marks, about \$1,000; to Raymond, about \$1,750, and to other persons, from one to two hundred dollars. He also sold to Marks some book accounts, admitted to be good to the amount of \$200.

Both Kasel and Marks are brothers-in-law of the alleged bankrupt.

He asserts that the debts due them was for money loaned. But these debts were not entered in his books. They were noted, as he says, in a memorandum book which he has lost. Nor is Marks able to produce the books in which the amounts loaned to Gallinger or paid by him are entered. The notes due from the Chinamen seem to be nearly worthless.

The respondent does not deny that he is now hopelessly insolvent, and he admits that his pecuniary condition has not altered since the time when he made the payments above referred to, and certain transfers or sales of real estate spoken of in his deposition.

The facts of the case thus seem to be that he has converted into cash the greater part of the goods obtained by purchase in this city, and applied the proceeds to the payment of certain alleged debts due to creditors in Oroville, who were to a considerable extent his relatives. That at the time he made these payments he knew himself to be insolvent, and that he intended to protect them at the expense of his other creditors is, I think, apparent.

As far as can be ascertained the payments were made in the months of October, November and December, and up

Opinion of the Court—Hoffman, J.

[July,

to the very time of the attachments. He could not have failed to know what was the probability of his obtaining the payment by the Chinamen of the notes held by him, and which with his stock of goods comprised nearly the whole of his available assets; and when he devoted the proceeds of so large a part of his stock of goods, for which he was indebted to the amount of \$10,000, less only the sum of \$50 which he had paid, to the payment of the debts said to be due to his relatives and friends, he must have been aware that he was giving those creditors a preference in direct violation of the Bankrupt Act.

The attachment by Wurmser he admits that he not only suffered, but procured—for it was levied at his suggestion and in consequence of letters advising his San Francisco creditors of the state of his affairs. But this information he did not see fit to give them until after he had paid some \$6,000 to his preferred creditors in Oroville. He denies that the attachment by Brock was procured by him.

If the word “suffer,” in the thirty-ninth section, has any meaning or operation beyond that of the word “procure,” it is clear that the bankrupt in this case *suffered* his property to be taken by Brock on legal process. (*In re Secor*, 1 B. R. 81; *In re Craft*, 1 B. R. 89; *In re Sutherland*, 1 B. R. 140; *In re Dibblee*, 2 B. R. 185; *In re Scheck*, 6 J. R. R. 183; *In re Haugton*, 1 B. R. 121; 2 B. R. 44.)

But at all events the confession of the judgment by the bankrupt, when he knew himself to be insolvent, and with the intent to enable Brock to secure his debt, by converting his lien by attachment into a lien by judgment, execution and levy, and thereby obtain a preference over other creditors, was clearly an act falling within the terms and spirit of the bankrupt law.

The sale of book accounts to Marks would seem also to be an act of bankruptcy. It was not done in the ordinary course of business, but, as he says, to obtain money to pay debts—and this at a time when he knew himself to be insolvent. The money obtained from Marks he must have applied to the payment of creditors, whose claims he preferred and satisfied, in clear violation of law.

The facts, as developed by the proofs, were evidently imperfectly known to the creditor, by whom the petition was filed. I think, however, that the second and third specifications are sustained. If necessary, the petition may be amended; for it is the duty of the Court, when acts of bankruptcy are clearly established, and especially in a case like this, where something more than a mere technical violation of the law may be suspected, to allow such amendments and further allegations to be made as may be necessary to sustain the proceedings.

The exceptions to the report of the Register are overruled. The petitioning creditor has leave to amend his petition, by alleging further acts of bankruptcy, and on his doing so, an order, adjudging the respondent an involuntary bankrupt, may be entered.

JOHN R. LAMB, AND EMMA, HIS WIFE, AND IDA
SQUIRES, v. A. R. BURBANK, J. P. O. LOWNSDALE. MILLARD O. LOWNSDALE, RUTH A. LOWNSDALE. AND MARY E. COOPER.

CIRCUIT COURT, DISTRICT OF OREGON,
JULY 19, 1870.

1. PARTITION OF REAL PROPERTY—SUIT IN EQUITY FOR.—Where the legal title is not in dispute, a suit for partition of real property may be maintained in a Court of Equity, although the equitable title to the whole premises is claimed by certain of the defendants and disputed by the complainants.
2. COVENANT IN DEED AGAINST ACTS OF GRANTOR.—A covenant in a deed “against the claims of all persons claiming by, through or under the grantors,” only operates upon the estate in the granted premises which the covenantor then had.
3. SAME.—Such a covenant only refers to the existing title or interest granted, and does not bar the covenantor from claiming the same premises against his own covenantee or grantee by an after acquired title.
4. COVENANT FOR FURTHER ASSURANCE.—A covenant in a deed, that if “the grantors obtain title from the United States, they will convey the same to the grantees by deed of general warranty,” is a covenant for further assurance, and entitles such grantees, when the contingency happens, to such conveyance of the legal title.

Opinion of the Court—Deady, J.

[July,

5. CONSTRUCTIVE POSSESSION.—A person seized in fee simple, has constructive possession of the premises of which he is seized, and will be presumed to be in the actual possession thereof, until the contrary appears.

Before DEADY, District Judge.

W. Lair Hill and Walter W. Thayer, for complainants.

David Logan and Erasmus D. Shattuck, for defendants.

DEADY, J. This suit was commenced on May 24, 1869. On July 24, thereafter, the defendant, Burbank, demurred to the bill. After argument of the demurrer, the plaintiffs had leave to file an amended bill, which they did on February 3, 1870. From this amended bill it appears:

I. That the plaintiffs are citizens of Kentucky, and that the defendants are citizens of Oregon; and that on May 4, 1862, one Daniel H. Lownsdale died intestate at Portland, leaving as his only heirs-at-law, the plaintiffs, Emma S. Lamb, the wife of John R. Lamb, and Ida Squires, the children of Sarah Squires, deceased, and the daughter of said Daniel H. and the defendants, his children, Mary E. Cooper, J. P. O. Lownsdale, Millard O. Lownsdale and Ruth A. Lownsdale; and that said Daniel H. died seized in fee simple of lot 4, in block 7, in the city of Portland aforesaid, and that said heirs are now seized of the same in fee simple as tenants in common—the said plaintiffs, Emma S. Lamb and Ida Squires, being so seized of one tenth thereof each, and the other four heirs of one fifth each; and that the interests of the plaintiffs in said lot are of the value of more than \$1,000.

II. That the defendant, Burbank, claims some equitable right in said premises, arising out of the facts and circumstances which follow, namely: that on March 8, 1850, the said Daniel H., and one Stephen Coffin and W. W. Chapman, were occupying in common a tract of land including the premises in controversy, known as the “Portland Land Claim,” and that the title thereto was not in either of said occupants, but wholly and absolutely in the United States; and that the said Chapman, being desirous to acquire the exclusive interest in said lot as against said Daniel H. and

1870.]

Opinion of the Court—Deady, J.

others in like situation, did, together with said Coffin, and one L. B. Hastings and D. S. Baker, make a certain writing or deed, wherein the said Daniel H., Coffin and Chapman, and Hastings and Baker, were named grantors, and the said Chapman, Hastings and Baker were named grantees, and the said Chapman, claiming to be the attorney-in-fact of said Daniel H., signed his name thereto.

III. That said writing of March 8, 1850, upon its face purports to be a deed, whereby and for the consideration of \$900 in hand paid, the said Chapman, Daniel H., Coffin, Hastings and Baker, "proprietors of Portland," among other things, undertake to "release, confirm and quitclaim unto" said Chapman, Hastings and Baker, lot 4 in block 7, in Portland, with covenants "to warrant and defend the said property against the claims of all persons claiming by, through or under the grantors," and, further, that if "they (the grantors) obtain title from the United States, they will convey the same to the grantees by deed of general warranty;" and that upon the back of said instrument was written the following: "For value received we agree to release to W. W. Chapman our interest in the within lots. Given under our hands and seals this March 27, 1850." (Signed and sealed by S. B. Hastings and D. S. Baker); and that said Burbank claims to have acquired in some way from said Chapman the interest so attempted to be released in said lot.

IV. That said Daniel H., as the bill charges, had no knowledge of the making of the writing of March 8, aforesaid, and that the same was not witnessed or acknowledged, and that as to said Daniel H., there was no consideration for the execution of the same, and that said Chapman had no power or authority to sign the name of said Daniel H. to said writing, or any such, or to bind him by any of the covenants or provisions contained therein, and that said writing is not the deed of said Daniel H.; neither did he ratify or confirm the same, nor was it ever delivered; but the said Chapman retained the possession thereof after the signing of it as aforesaid, nor did any interest in or possession of said lot pass by virtue of said writing; but that the

Opinion of the Court—Deady, J.

[July,

same is wholly fraudulent and void; and that afterwards said Chapman attempted to convey the pretended interest in the premises claimed to have been acquired by the means aforesaid to certain parties who conveyed the same to said Burbank, but that said attempted conveyances were informal and often without consideration, of which facts Burbank had notice; and that afterwards, on March 20, 1862, said Chapman and Coffin, to strengthen the color of right, attempted to be created by said writing of March 8, aforesaid, went before the County Judge, Edward Hamilton, and acknowledged the execution of the same, and thereupon, at the instance of said Chapman or Burbank, it was recorded in the office for the record of deeds; and that said Hastings and Baker never had any interest in the Portland land claim, unless under some private agreement with Chapman, or in the execution of said writing, and their names were used thereto, simply to give color to the transaction and thereby assist Chapman in his attempt to acquire the interest of said Daniel H. in said lot 4.

V. That after the making of the writing of March 8, aforesaid, and after the passage of the act of Congress, approved September 27, 1850, commonly called the donation law, said Daniel H. by a compliance with the provisions of said act acquired a title from the United States to certain lands, including said lot 4; and that in June, 1865, a patent therefor was duly issued to said Daniel H. and his heirs, under which the aforesaid heirs at law derive their title aforesaid.

VI. That the said Burbank has no other interest in the premises than that arising from the facts and circumstances above stated, but he claims an interest or right under the same to said lot and to the possession thereof, which claim constitutes a cloud upon the title of the plaintiffs and other heirs of said Daniel H. to the premises, and hinders and obstructs a partition thereof between said plaintiffs and other heirs, *wherefore* the plaintiffs pray that said Burbank may, by the decree of this court, be barred from setting up or asserting any claim to said lot 4, and that the plaintiffs' title may be declared and that the premises may be partitioned between themselves and the other heirs aforesaid.

1870.]

Opinion of the Court—Deady, J.

Afterwards, on February 28, 1870, the defendant Burbank demurred to the amended bill, and assigned for causes of demurrer:

1. That it appears that the plaintiffs have a legal title to the premises and a complete remedy against the defendant at law.

While it is true that it appears from the amended bill that the plaintiffs and the defendants, their co-heirs, have the legal title to the premises, it does not follow that as to the *claim* of the defendant Burbank, they have any remedy at law. A false or pretended claim of title, that amounts to a cloud upon the true title can only be relieved against in equity. So far as now appears, Burbank's claim to this property is without right, but at the same time is founded upon such facts and circumstances, as makes it a cloud upon the title of the plaintiffs and hinders and obstructs a partition of the property between the heirs.

2. That it appears that the title to the premises is in dispute and the defendant holds the same adversely to the plaintiffs.

Now it does not appear as in this cause of demurrer alleged, that the defendant Burbank holds the property adversely to the plaintiffs, *or at all*, but only that he *claims* an equitable right or interest therein and a right to the possession thereof by reason of the facts and circumstances above mentioned. Nor does it appear that the title is in dispute—*the legal title*. So far as the equitable title is concerned if that is in dispute that itself is a good reason for bringing this suit or making Burbank a party to it. Equitable titles belong particularly to courts of equity and cannot be sent to courts of law. (*Coxe v. Smith*, 4 *John. Ch.* 276.)

Upon the amended bill, the legal title is in the heirs of Daniel H. as tenants in common. If the writing of March 8, was executed by authority of Daniel H., and bound him and his heirs, still the legal title is in these heirs, and Burbank only has a right in equity to have a conveyance of such legal title.

At the date of the writing of March 8, 1850, none of the parties had any interest in the land, except the bare possession—the legal title was in the United States.

The first covenant in the writing is a special or limited

covenant of warranty, “against the claims of all persons claiming by, through or under the grantors,” and only operates upon the estate which Daniel H. then had in the premises. It is well settled that such a covenant only refers to the existing title or interest granted, and does not bar the covenantor from claiming the same premises against his own covenantee or grantee by title acquired subsequent to the making of his own deed. (2 Wash. R. p. 665.)

So in this case, Daniel H. acquired the title to this property from the United States long after the date of the writing which contains this covenant, and he or his heirs hold it unaffected by it. The second covenant, that if “the grantors obtain title from the United States they will convey the same to the grantees by deed of general warranty,” is a covenant for further assurance, and was intended to meet the contingency which afterwards happened—that the United States should grant the premises to Daniel H. Assuming, then, for the present, that it should be determined upon the final hearing of the cause that the writings and conveyances under which Burbank claims are valid and sufficient for the purposes and intents expressed therein, the heirs would have the title, and Burbank would be entitled in equity to a conveyance of the same. But in the meantime it is charged in the bill that these writings are fraudulent, informal and void, and are only a cloud upon the title of the plaintiffs. The inquiry involves the question of whether Burbank is entitled in equity to have a conveyance of the land from the heirs of Daniel H.—whether by virtue of the second covenant he has an equitable estate in the premises or not. To determine this question is the proper promise of a court of equity.

3. It does not appear that the plaintiffs are in possession of the premises.

Whether it is necessary that the plaintiffs should be in actual possession of the premises to enable them to maintain this suit as against Burbank, need not be considered. It appears that they are seized in fee simple. This gives them constructive possession and the right to the actual possession, which will be presumed until the contrary appears.

The demurrer is overruled.

1870.]

Opinion of the Court—Hoffman, J.

EDWARD FOGARTY v. JAMES GERRITY,
ALLEGED BANKRUPTS.

DISTRICT COURT, DISTRICT OF CALIFORNIA,
JULY 23, 1870.

1. RESIDENCE OR PLACE OF BUSINESS MUST BE WITHIN DISTRICT TO GIVE COURT JURISDICTION.—Where a petition had been filed against certain parties praying that they be adjudged bankrupts, and on the return day they appeared and with their own consent were so adjudged; and subsequently another creditor moved the Court to dismiss the proceeding on the ground that the bankrupts had never resided or carried on business in this State: *Held*, that the Court was without jurisdiction and that the proceedings should be vacated and set aside.

Before HOFFMAN, District Judge.

J. Naphtaly, Attorney for petitioning creditor.

HOFFMAN, J. On the twenty-seventh of May, 1870, a petition was filed on behalf of I. D. Fish & Co., of New York, praying that the above named parties be adjudged involuntary bankrupts. On the return day of the order to show cause the alleged bankrupts appeared and consented to the adjudication, which was accordingly made and the matter referred to the register.

A motion is now made on behalf of one P. D. Casey, an attaching creditor, that the adjudication be set aside and all proceedings in bankruptcy vacated on the ground that the Court has no jurisdiction over the case.

In support of this motion various affidavits were read, from which it clearly appears that the alleged bankrupts have never conducted any business within this district, nor had any place of business established therein as distinct from their place of residence. That they reside in the State of New York, where they have a notorious place of business, and that they arrived in this city about April 12, 1870, some six weeks prior to the filing of the petition against them.

On this state of facts it is evident that this court would be without jurisdiction to entertain a petition in voluntary bankruptcy presented by the bankrupts. By the 11th § of the Bankrupt Act, a debtor desirous of availing himself of

the provisions of the act, is required to apply by petition “addressed to the Judge of the Judicial District in which such debtor has resided or carried on business for the six months next preceding the time of filing such petition, or for the longest period during such six months.” Under this and a somewhat similar clause, in the Act of 1841, the district courts have frequently declared themselves without jurisdiction to entertain the petition, make an adjudication or grant a discharge where it appeared that the application had not been addressed to the Judge of the proper district.

In the case of *Kinsman* (1 N. Y. Leg. Obs. 309) the late judge of the southern district of New York, the objection appears to have been made on the part of creditors.

In the case of *Little* (2 Bk. R. p. 97), the discharge of the bankrupt was opposed by creditors, and refused; the Court declaring, that “the question, whether the petition was filed in the proper district, was a question of jurisdiction.” The discharge was refused “*for want of jurisdiction in the Court to grant it.*” In another case, the Register to whom the matter was referred, of his own motion, after examination of the petitioner, refused to adjudicate, for the same reason, and his decision was sustained by the Court. (*In re W. H. Magie*, 2 B. R. 369.)

In the case *W. S. Walker* (1 B. R. 90), a creditor filed a petition similar to that preferred in the case at bar, to vacate all proceedings in the cause, for want of jurisdiction, averring that the bankrupt had not resided in the district for the greater part of the six months next preceding the filing of the petition. The Court (per Lowell, J.) held, on the facts, that the residence was established, but no doubt seems to have been entertained, that if the facts had been otherwise, the prayer of the petition must have been granted.

The thirty-ninth section, on which proceedings in involuntary bankruptcy are founded, does not, like the eleventh section, designate the District Judge to whom the petition of the creditor shall be addressed. It provides, that “any person residing and owing debts aforesaid, who, after the passage of this act, shall—(the various acts of bankruptcy are then enumerated, and the sentence continues)—shall be deemed to have committed an act of bankruptcy, and

1870.]

Opinion of the Court—Hoffman, J.

subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors," etc.

The succeeding section provides, that "upon the filing of the petition authorized by the next preceding section, if it shall appear that sufficient grounds exist therefor, *the Court* shall direct the entry of an order," etc.

The forty-first and forty-second sections provide for further proceedings, and for the final adjudication, that the debtor is a bankrupt. These proceedings are to be taken in the Court in which the creditor's petition has been filed; but in which of the District Courts the petition is to be filed, the act does not in terms declare. It cannot, I think, be contended that any of the District Courts, at the election of the creditor, can entertain the petition; for, in such case, it might be filed and the debtor cited to appear in a remote district, where he has never resided nor carried on business; where he has no property, and where none of his creditors live. The inconveniences, and the opportunities for collusion which would thus be presented, make it evident that such could not have been the intention of Congress.

It may, with more plausibility, be urged that the Court to which the petition is to be presented, is the Court of the district in which the act of bankruptcy has been committed. But the objections to this construction are insuperable. The alleged act of bankruptcy may have been committed in a district where neither the debtor nor any of the creditors reside or carry on business. It may have been done by the debtor while temporarily passing through a district remote from his residence or place of business, or even while traveling through various districts. To compel him to appear to answer before the Court of the district in which he happened to be when the alleged act was committed—to oblige all the creditors whose places of residence may be distant, to appear before the same tribunal, to appoint an assignee in that district to take possession of property, no part of which might be found within it, would be productive of intolerable hardships and vexations.

Moreover, if the jurisdiction to entertain the petition is deemed to be given exclusively to the Court of the Dis-

trict where the act of bankruptcy has been committed, cases might often occur where no Court would have jurisdiction. For the fraudulent payment, gift sale, conveyance or transfer might have been made out of the limits of any district; as for example by a passenger on a voyage by sea to or from this place and an eastern port.

The fifth clause of section 39 numerates as an act of bankruptcy the making of any assignment, gift, sale, etc., of estate, property, rights, etc., "*either within the United States or elsewhere*, with intent to hinder, delay or fraud creditors. Under the construction we are considering no Court could take jurisdiction of an act of bankruptcy of this description if committed without the limits of the United States.

That this construction of the Act was not contemplated by the Supreme Court, is evident from the language of the xvi order in bankruptcy. It provides that where two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicil.

If petitions could be filed only in the Court of the district in which an act of bankruptcy had been committed, the general order referred to would afford no means of determining in which Court the first hearing should be had. The terms of this general order indicate that where several petitions are filed against a debtor, one of them at least will have been filed in the district of his domicil, and it may fairly be inferred from the tenor of the order that the Supreme Court understood that proceedings against a debtor to procure an adjudication of involuntary bankruptcy, were like those instituted by himself to obtain an adjudication of voluntary bankruptcy, to be had in the Court of the district in which he has resided or carried on business for the preceding six months, or for the longest period thereof. And this construction seems not only reasonable, and less objectionable than any other which can be suggested, but most in accordance with the other provisions of the Act.

It has been said that the scope and purpose of the thirty-ninth section are to oblige insolvent debtors to take the benefit of the bankrupt act, and thus to insure an equal

1870.]

Opinion of the Court—Hoffman, J.

distribution of their estates under its carefully framed provisions. (Bump on Bankruptcy, p. 128, and cases cited.)

By the thirty-ninth section he can be compelled to do what by the eleventh he is permitted and invited to do. The fact that in one case the adjudication is demanded by a creditor, and in the other is asked for by the bankrupt, ought not reasonably to affect the determination of the question as to what tribunal has jurisdiction over the case. The only case cited where the question we are considering has arisen, is that of *In re Palmer*, in the Southern District of New York (6 Int. Rev. Rec. 45). In that case the debtor, against whom a petition had been filed in the southern district, resided and carried on business in the northern district of New York. The learned Judge of the southern district dismissed the proceedings for want of jurisdiction.

It is urged, that inasmuch as the bankrupt has assented to this proceeding, the objection cannot be raised by a creditor who has intervened. But consent cannot give jurisdiction—and that the question is one of power and jurisdiction in the Court is evident—nor can it make any difference whether the proceeding is involuntary or involuntary bankruptcy. In the one case the petition is filed by the bankrupt, and in the other by a creditor. But in either case it must be addressed to the Court authorized by law to take cognizance of the case, and to none other. Nor can it even be said in this case that the parties have submitted to the jurisdiction. One creditor has invoked it, and the bankrupts have not objected. But all other creditors are parties to and bound by the proceeding. If it be sustained, their ordinary remedies against the debtors will be suspended—the whole of his property will pass into the hands of an assignee, and they will be obliged to come into this Court to prove their debts, enforce their liens, adjust their accounts, and receive the dividends—and their unsatisfied claims may be forever barred by the discharge of the bankrupt.

They have, therefore, a clear right to be heard, and to resist the proceeding, on the ground, that the Court is without jurisdiction. My opinion is, that, under the facts of the case, the Court has no jurisdiction, and that the adjudication and other proceedings in this cause should be set aside and vacated.

JOHN R. LAMB, AND EMMA, *his wife*, AND IDA
SQUIRES, *v.* JACOB KAMM, J. P. O. LOWNSDALE,
MILLARD O. LOWNSDALE, RUTH A. LOWNSDALE,
AND MARY E. COOPER.

CIRCUIT COURT, DISTRICT OF OREGON,
JULY 26, 1870.

1. COVENANTS IN DEEDS.—No covenant is implied from the use of the words in a deed, “bargain, sell and quitclaim.”
2. IDEM.—A bargain, sale and quitclaim of all a party’s “right, title or interest” in real property, “whether in possession or expectancy,” passes nothing but what is then vested in the bargainer.
3. ESTATE IN EXPECTANCY.—DEFINITION OF.—Does not include a mere hope or possibility, without present interest.
4. COVENANTS IN DEEDS.—A covenant, that the bargained premises are free from encumbrances caused by the grantor, is not prospective, and is limited to the acts of the grantor.
5. IDEM.—A covenant against the claim, right or title of any person claiming through the grantor, is equivalent to a special covenant of non-claim or warranty.
6. IDEM.—Such a covenant only operates upon the estate which the grantor then had in the premises, and does not prevent him or his heirs from asserting an after-acquired title to the same premises.

Before DEADY, District Judge.

W. Lair Hill and *Walter W. Thayer*, for complainants.

Erasmus D. Shattuck, for defendants.

DEADY, J. This suit was commenced November 26, 1869. From the bill, and amendment thereto made January 4, 1870, it appears :

I. That the plaintiffs, John R. Lamb, and Emma Lamb his wife, and Ida Squires, her sister, are citizens of the State of Kentucky, and that the defendants, Jacob Kamm, Mary E. Cooper, and Millard O., Ruth A. and James P. O. Lownsdale, are citizens of the State of Oregon.

II. That on May 4, 1862, Daniel H. Lownsdale died intestate at the city of Portland, Oregon, seized in fee simple of the west halves of lots 5 and 6 in block 39, in said city of Portland, leaving as his only heirs at law the afore-

1870.]

Opinion of the Court—Dedy, J.

said defendants, except Kamm, and the aforesaid Emma and Ida; the said Emma and Ida being the children of Sarah M. Squires, a deceased daughter of said Daniel H., and the other of said heirs being his children; and that the heirs aforesaid are now seized in fee simple of the premises aforesaid as tenants in common—the said Emma and Ida being so seized of one tenth each of said premises, and the other four heirs of one fifth each thereof; and the plaintiffs' interests in the premises are of the value of more than \$2,000.

III. That the defendant Kamm claims some interest in the premises, and pretends to derive some right thereto from Daniel H., by virtue of a deed executed by said Daniel H., together with Stephen Coffin and W. W. Chapman, to said Chapman on August 9, 1850, and a subsequent deed from said Chapman to Simon B. Marye, and a deed from said Marye to said Kamm, and that by the deed of August 9, 1850, aforesaid, the grantors therein, on consideration of the sum of \$11,000, among other lots or parcels of land, did bargain, sell and quitclaim to said Chapman, his heirs and assigns forever, all their right, title, interest, estate, claim, property and demand whatsoever, both at law and in equity, as well in possession as expectancy, to all that piece, parcel or lot of land lying and situate in Portland, Washington County, to wit: lots numbered 5 and 6 in block 39, with all and singular the hereditaments, etc., free from all incumbrances caused or permitted by them, their heirs, etc.,—and “free from the claim, right or title of all and every person or persons claiming by, through or under them, their heirs, etc., but not further or otherwise.

IV. That at the date of the execution of the deed of August 9, 1850, the premises belonged to the United States and were a part of the public land thereof; and that afterwards and before the death of said Daniel H., the United States did grant said premises to said Daniel H., who died seized thereof as aforesaid, and the same descended to his heirs at law aforesaid, unaffected by said deed. Wherefore, the plaintiffs pray that their title to the premises may be declared, and that the same may be partitioned between themselves and their co-heirs aforesaid.

The defendants, except Kamm, being in fact united in interest with the plaintiffs, make no answer or defense to the bill.

On February 1, 1870, the defendant Kamm demurred to the bill, and assigned for causes of demurrer:

I. That it appears from the bill that the plaintiffs have no right to a partition of the premises; and

II. That it appears that Kamm claims title to the premises adversely to the plaintiffs; and that the title is in dispute, and that of the plaintiffs at least doubtful.

As against the defendant Kamm, the plaintiffs do not seek partition, but to have their title declared and quieted. If this defendant has no interest in the property, as alleged in the bill, then he has no interest in the question of partition, nor any right to object to a partition of the premises between the owners thereof. On the other hand, if the plaintiffs are barred by the deed of their ancestor from claiming any interest in this land, as against Kamm or other person claiming under the deed of August 9, 1850, then they have nothing in the premises to partition.

So far as the title is concerned, it is true that Kamm claims adversely to the plaintiffs. If it were not so, this suit to quiet the title would not have been brought. To ascertain whether this claim of Kamm's is well founded or not, and if the latter, to relieve the plaintiffs therefrom, is one of the objects of this suit—and so far as Kamm is concerned, is the only one. Again, there can be no question but that as between Kamm and the plaintiffs there is a *dispute* as to the title of the property, but how that fact in any way militates against the plaintiffs' right to maintain this suit against Kamm is not perceived. On the contrary, without such adverse claim and dispute between the parties there would be neither occasion or right to maintain a suit to quiet title. These, then, are no sufficient causes of demurrer.

Kamm's right to the premises rests upon the effect to be given to the deed of Daniel H., Coffin and Chapman to Chapman, of August, 9, 1850. The operative words in the granting clause of the deed are "bargain, sell and quit-

1870.]

Opinion of the Court—Deady, J.

claim.” At common law no covenant was implied from the use of these words in any case. (*Frost v. Raymond*, 2 Caine’s Rep. 190; Rawle on Cov. 475.) Neither was any covenant implied from the use of these words by the statute regulating conveyances, then in force in the Territory of Oregon. (Or. Archives, 138, Conveyances.) The grantors only undertake to dispose of their then “right, title and interest” in the premises, and that was only the bare possession. (*Field v. Squires*, Deady’s R. 379.) It is true they also made use of the words “estate, claim, property and demand whatsoever, both at law and in equity, as well in possession as in expectancy,” but these add nothing in legal effect to the phrase which precedes them—*right, title and interest*.

On the argument, counsel for the defendant sought to give some special signification to the word *expectancy* as indicating a sale or disposition by the deed of any interest in the premises which the grantors might then for any reason *expect to acquire in the future*. But no such effect can be given to the word. Although, where a deed contains proper covenants, an after acquired estate in the property may pass to the grantee by operation of such covenants, yet no estate in real property can be bargained, sold or released before it is acquired by the grantor. As to the term of their enjoyment, estates in real property are divided into estates in possession and expectancy. Of expectancies, there are two sorts: One created by the act of the parties, called a *remainder*; the other by act of law, and called a *reversion*. (2 Black. Com. 131.) But in both these instances of estates in expectancy, the estate is already vested in the party entitled to it, but limited to take effect and be enjoyed after another estate in the same premises is determined. (*Id.* 132, 141.) But a mere expectation or belief that a party will at some future time acquire an interest in certain property, is not itself an estate or interest of any kind, and cannot be conveyed by deed. For instance, a son who is heir apparent to his father, may reasonably expect to inherit the latter’s property, but an expectation or hope not being an interest in the property, it is well settled that the deed of the heir under such circumstances conveys nothing and is inoperative. (2 Wash. R. P. 646–7.)

The deed in question contains no covenants *in form*, but does contain two clauses or declarations which must be construed to have the legal effect of covenants. One of these is in effect a covenant against incumbrances caused or permitted by the grantors, and the other is a covenant against the claim, right or title of any person claiming through the grantors. Both these covenants are qualified—that is, limited to the acts of the grantors. It is not pretended that the one against incumbrances would have prevented Daniel H., or now prevents his heirs, from setting up the title to the premises subsequently acquired from the United States. The grant of the premises to Daniel H. by the United States was not an incumbrance caused or permitted by him. Besides, this covenant is not in its nature prospective, and only refers to incumbrances existing at the date of the deed.

The second covenant is, in effect, a special covenant of non-claim, which is similar to the ordinary covenant of warranty. (Rawle on Cov. 222.) This covenant only operates upon the estate which Daniel H. then had in the premises, which was the bare possession. As was said by this Court, in *Lamb v. Burbank et al.*, (*Ante* 227.) “It is well settled that such a covenant only refers to the existing title or interest granted, and does not bar the covenantor from claiming the same premises against his own covenantee or grantee by title acquired subsequent to the making of his own deed.” (2 Wash. R. P. 665; *Comstock v. Smith*, 13 Pick. 113; *Trull v. Eastman et ux.*, 3 Met. 129.)

At the time Daniel H. made this covenant against any person claiming through himself, he had no estate or interest in the premises except the bare possession. That the title was in the United States was well known to all the parties to the deed—particularly the grantee, Chapman. Afterwards the United States saw proper to grant the premises to Daniel H., and the “claim, right or title” now set up to the premises by his heirs, is that of the United States, and not that covenanted against by their ancestor.

It follows from these conclusions, that the heirs of Daniel H. are, as they claim, the owners in fee simple of the premises, and that the defendant, Kamm, has no interest therein or right thereto.

The demurrer is overruled.

1870.]

Opinion of the Court—Deady, J.

In re PRICE FULLER.DISTRICT COURT, DISTRICT OF OREGON,
AUGUST 1, 1870.

1. **BANKRUPTCY, WHEN JUDGMENT VOID.**—A judgment taken contrary to the bankrupt act is not void unless a petition in bankruptcy is filed by or against the debtor within six months from the entry of the judgment.
2. **IDEM.**—A judgment by confession is not void under the code for want of a sufficient statement of the facts out of which the indebtedness arose, except as to creditors who have acquired a lien upon the debtor's property before a sale upon the confessed judgment. *Query*, whether such judgment is even then void if it can be shown by evidence *aliunde*, that the judgment was in fact given in good faith and for an actual debt.
3. **CREDITORS OF BANKRUPT WHEN NOT ENJOINED.**—The District Court has jurisdiction to ascertain and liquidate all liens upon the bankrupt's property, and in the exercise of this jurisdiction may enjoin a creditor from enforcing a judgment in a State Court against the property of the bankrupt, but after the process of the State Court has been executed by a sale of property, the District Court will not interfere.
4. **STIPULATION IN JUDGMENT AS TO INTEREST.**—A stipulation in a judgment that the interest on it shall bear interest if not paid annually, is void and does not make such judgment usurious.

Before DEADY, District Judge.

THIS was a motion to modify an injunction allowed on the petition of the bankrupt under section 40 of the Bankrupt Act.

Lansing Stout, for motion.

M. W. Feckheimer, contra.

DEADY, J. Price Fuller was adjudged a bankrupt in this Court on December 20, 1869, upon his own petition therefor, filed on the 18 of the same month.

On March 27, 1869, the bankrupt confessed judgment without action in the Circuit Court for the county of Benton in favor of Green B. Smith for the sum of \$2,665, with interest payable annually at one per centum per month, and if not so paid to be considered as principal and thereafter to draw the same rate of interest as the original principal.

“The confession states the origin of the indebtedness for which the judgment was confessed as follows:

“*The facts out of which said indebtedness arose are these, for money, gold coin, borrowed of and in hand paid to me the said defendant by the said Green B. Smith.*”

At the date of this judgment the bankrupt owned two tracts of land in Benton county, one containing 640 and the other about 23 acres. The judgment was duly docketed on the day it was confessed and thereafter became a lien upon the real property aforesaid. On November 20, said Smith sued out execution upon said judgment, upon which the sheriff of the county aforesaid on December 2, 1869, sold of the personal property of the bankrupt what brought at such sale \$50.50; and on December 24, 1869, said sheriff sold upon said execution the first mentioned tract of land aforesaid, to one Thomas Reed for the sum of \$2,750; and on January 7, 1870, said sheriff levied upon the second mentioned tract of land aforesaid and was proceeding to sell the same on January 10 thereafter when he was enjoined by the process of this court.

On January 4, 1870, the bankrupt filed a petition in this court praying that the sheriff aforesaid be enjoined from paying over to said Smith any of the proceeds of the sale of the real property aforesaid, and from selling upon said execution any of the real property of the bankrupt. On reading and filing the petition, an order was made allowing the writ of injunction as prayed for.

In addition to other facts above stated, it was alleged in the petition, that the property aforesaid would not fetch so much at the sheriff's sale as upon a sale by the assignee, because of doubts existing as to the legality of a sale by the former, and that if the property already sold were re-sold by the assignee, it would, in the opinion of the petitioner, bring \$3,000, and that said Smith at the time of accepting the confession of judgment aforesaid, “*knew the petitioner to be insolvent.*” On July 11, Smith applied to the Court for an order modifying the injunction so as to permit the sheriff to pay over the proceeds of the property sold before the service of the injunction.

1870.]

Opinion of the Court—Dedy, J.

By agreement between counsel for the application and the assignee (who had been appointed since the allowance of the injunction) the motion was heard on July 18. On the hearing, among other papers in the case, counsel for the assignee read a paper, verified by said Smith on January 27, setting forth the nature of his demand against the bankrupt, the consideration thereof, what security he had therefor, as above stated, and that the property aforesaid is not worth more than his claim, and “prays that the money in the hands of the sheriff and the property remaining unsold be released to him.”

Upon these facts the reasonable inference is, that Smith took the judgment in violation of the Bankrupt Act. It was taken with a knowledge of Fuller’s insolvency, and therefore must be presumed, in the absence of any evidence to the contrary, to have been taken with the belief that a fraud on the act was intended. But as the judgment was given more than six months before the filing of the petition by the bankrupt, it is not void although taken contrary to the act. The Bankrupt Act does not avoid a judgment except as declared and provided in section 35 of the act. Section 39 declares what conduct of a debtor shall be deemed an act of bankruptcy. It also imposes a forfeiture of his debt upon the creditor who participates in the act of bankruptcy, and gives the assignee a right of action to recover the money or property paid or transferred contrary to the act, by means of an act of bankruptcy. But it does not declare that a judgment or other act which is to be deemed an act of bankruptcy on the part of the debtor, *is also to be held void as a judgment*. Sections 35 and 39 must be taken together. The one defines an act of bankruptcy, and the other declares when and under what circumstances acts done or suffered by the debtor shall be void.

So far, then, as the Bankrupt Act is concerned, this judgment is valid, because not given within six months before the filing of the petition by the bankrupt. In other words, neither Fuller nor any of his creditors having petitioned to have the debtor adjudged a bankrupt, within six months from the confession of this judgment, it is cured by lapse of time.

This injunction was allowed without argument, and at the time I had an impression that the judgment was void under the Code, because the confession did not sufficiently state the facts out of which the indebtedness arose. There can be no question of the insufficiency of the statement, but upon examination of the subject, I am satisfied that the judgment is not therefore void. In *Miller v. Earle* (24 N. Y. 110), the question was as to the effect to be given to a judgment like this, and the Court said :

“As between the parties themselves, however, the judgment confessed should be held legal and valid; that being so, the levy and sale of property under it was good as against the defendant, and all the world, except judgment creditors existing and having a lien upon his property.”

In *Lee v. Fig* (37 Cal. 336), the same question arose in relation to a judgment confessed in 1851 upon a defective statement by *Barton Lee* in favor of *Henley & Hastings*. Sawyer, J., delivering the opinion of the Court, said :

“The judgment is good as between *Henley & Hastings* and *Barton Lee*, and was only subject to be attacked for fraud by creditors of Lee, who were defrauded thereby, and that in some direct proceeding before a sale of the property under it to innocent parties.”

It is shown by these authorities, that a judgment, though confessed upon a defective statement, is not absolutely void, but only so, as to creditors who have a lien upon the property sought to be affected by the judgment. Indeed, in *Lee v. Fig* (*supra*), the learned Judge maintained, that even as against lien creditors, the insufficiency of statement is only *prima facie* evidence of fraud, and that it was admissible to support the judgment by proof that the transaction was in good faith and the judgment confessed upon an actual existing debt.

At or before the filing of the petition it does not appear that any of the creditors of the bankrupt had a lien upon the property affected by this judgment, and therefore they were not then in a condition to question its validity. Nor does it appear that they have since obtained a specific lien

1870.]

Opinion of the Court—Deady, J.

thereon by judgment, or the like; but I think the act must be construed as giving the creditors who prove their debts, from and after the filing of the petition, such a direct interest in the property or assets of the bankrupt as to enable them, or the assignee for them, to attack such a judgment by suit as fraudulent in law or fact.

The judgment against the bankrupt having, by lapse of time, become valid, so far as the Bankrupt Act is concerned, Smith has acquired a lien thereby upon the real property in question. Upon the application of parties interested, this Court has jurisdiction to ascertain and liquidate this lien (B. Act, sec. 1), and while so doing, to enjoin Smith from enforcing the same by execution out of the State Court. But after the process of the State Court has been executed, and the property sold thereon, it is too late for this Court to interfere. The purchaser at such sale acquires a good title, and this is so, even if the judgment was fraudulent, provided the purchaser was an innocent one. For this reason, as well as upon general principles, this Court could not set aside the sale upon the process of the State Court and order the property re-sold, however apparent it may be that it was sold much below its real value. The remedy was in the State Court, upon objections to the confirmation of the sale.

It is not necessary now to consider whether the assignee may maintain action to recover the proceeds of this property upon the ground that the judgment was void under the Code. This injunction is not ancillary to any suit for that or other purpose, but was allowed under section 40, to prevent "any person from making any transfer or disposition of the debtor's property" pending the petition to have the debtor adjudged a bankrupt. Here, however, there seems to be, at best, only a *right of action* in the assignee to recover these proceeds as money had and received to his use. It may also be questioned whether the injunction allowed by section 40, extends to a case of voluntary bankruptcy.

Objection is also made against this judgment that it is usurious. This objection is predicated upon the stipulation in the judgment that the accruing interest should bear

Opinion of the Court—Deady, J.

[August,

interest if not paid annually. There can be no doubt but this provision shows that it was intended that this judgment should draw more than the legal rate of interest. But I do not think a judgment or decree can become usurious by any such means. The Code provides the rate of interest a judgment shall bear and the parties cannot change it by stipulations or terms inserted therein. Such stipulations are simply void—as, for instance, that the interest accruing on a judgment shall be paid annually, and if not, shall bear interest as principal. The payment of a judgment confessed for a sum due may be enforced by execution, but if the creditor neglects or forbears to use this remedy he cannot recover interest on interest accruing in the meantime. Besides, in this case this stipulation never was attempted to be enforced, as the property was sold on the execution long before the expiration of the first year after the entry of judgment.

As to the money arising from the sale of the 640 acre tract, on December 24, I think the injunction was improperly allowed, and so far it must be dissolved and the assignee left to pursue such remedy in the premises, if any, as he may be advised that he has. As to the 23 acre tract a dissolution of the injunction is not asked for. There can be no doubt but that the Court had power to enjoin the attempted sale of this property, but whether there is any sufficient reason for its continuance may be a question. This may depend upon whether the assignee may feel warranted in beginning a suit to set aside the judgment on the ground of fraud. If the judgment should be set aside on that ground, this tract of land would be discharged from the lien and become a part of the general assets of the bankrupt.

As to the \$50.50 made on the execution on December 2, by the sale of personal property, it belongs to the estate of the bankrupt. The judgment gave Smith no lien upon the personal property of his debtor, and the filing of the petition in bankruptcy, on December 18, and the subsequent adjudication, avoided the lien of the levy made on November 20 previous.

1870.]

Opinion of the Court—Hoffman, J.

HENRY C. HYDE, *Assignee of Geo. C. Eldridge,*
a Bankrupt, v. H. P. SONTAG AND GEO. C.
ELDRIDGE.

DISTRICT COURT, DISTRICT OF CALIFORNIA,
AUGUST 2, 1870.

1. BANKRUPT—FRAUDULENT CONVEYANCE BY.—Judgment in favor of the assignee for the value of property conveyed to an alleged creditor of the bankrupt, notwithstanding that the conveyance was made more than six months before the commencement of the proceedings in bankruptcy, it appearing that the conveyance was fraudulent and intended to cheat and hinder creditors.

Before HOFFMAN, District Judge.

H. F. Crane, attorney for assignee.

E. J. & J. H. Moore, Howe & Rosenbaum and *D. T. Sullivan*, attorneys for defendants.

HOFFMAN, J. The proofs in this case clearly establish that the bankrupt, being insolvent, made an assignment of all his property in this city to an alleged creditor with a view to give him a preference, and that the alleged creditor knew the bankrupt to be insolvent and that a fraud on the act was intended.

The adjudication in bankruptcy having been made on the voluntary petition of the bankrupt, which was filed more than six months after the assignment, the suit cannot be sustained under the provisions of the 35th and 39th §§.

It is contended, however, on the part of the assignee, that the sole object of the assignment was to hinder, delay and defraud the creditors of the bankrupt. That the transfer was merely colorable and to cover up the title to the property, and that the bankrupt was not at the time indebted to the defendant.

In my judgment the proofs taken before the register sustain these allegations. The bankrupt admits that his property in Nevada had been attached, and that he had assigned

Opinion of the Court—Hoffman, J.

[August,

the whole of it to the First National Bank of that State. It appears that very soon after making this assignment he left Nevada for this city, openly declaring his intention to put his property in this city where his creditors would not be able to reach it. Immediately on his arrival he made the transfer in question to the defendant. He started from Nevada on the nineteenth of May; he made the transfer to defendant on the twenty-second of May. The latter had been for some months employed as his agent to carry on the business of a coal yard, belonging to the bankrupt, at a salary of \$75 per month.

The sale of the coal yard, its furniture, appurtenances, good will, and outstanding debts, appears to have been concluded in great haste and under circumstances fit to excite suspicion. The price for which it was bought (\$1,500) seems to have been grossly inadequate, even on the defendant's own showing. His second explanation in regard to the value of the property transferred to him, in no respect alters the complexion of the matter. No accounting was had between the parties, such as would naturally take place in a business transaction of this nature.

The receipts from the coal yard are stated to have been about \$1,300 per month. The defendant alleges that he sent to the bankrupt, at various times during the three months the latter was in Nevada, \$960. The whole of this sum he charges as a debt due him from the bankrupt. He gives no account whatever of the large sums which, during that period, he must have received from the coal yard. That he did not expend any considerable amount in replenishing the stock of the establishment, is evident. For he would have us believe that the value of the stock at the time of the transfer was but a few hundred dollars.

The statements of both the bankrupt and the defendant are confused and contradictory. They entirely fail to furnish that clear, detailed and precise explanation which, if the transaction were an honest one, could readily be afforded. .

Their close relations to each other subsequently to the transfer, corroborate our suspicions. We find the defend-

1870.]

Syllabus.

ant advancing considerable sums to the bankrupt, becoming interested with him in a store on Fourth street, a large part of the stock of which they clandestinely carry off and dispose of on joint account. The bankrupt spends much of his time at the coal yard, but objects to parties being directed to him at that place, for fear, as he says, of exciting suspicion.

He files his petition in bankruptcy just two days after the six months from the date of the transfer have expired, and now to this suit by the assignee he pleads, while admitting a clear fraud on the Bankrupt Act by an assignment of all his remaining property to an alleged preferred creditor; that the assignment was not made within six months previous to the filing of the petition, and that the assignee cannot, therefore, recover.

All these circumstances seem to me clearly to disclose the true nature of the transaction, viz.: that it was a fraudulent contrivance and device by the bankrupt and the defendant to cover up and conceal the true ownership of the property, and to hinder, delay and defraud creditors.

The value of the property sold, as testified to by the defendant himself was \$3,226, and for this amount a judgment must be entered.

JOHN R. LAMB AND EMMA, HIS WIFE, AND IDA SQUIRES v. L. H. WAKEFIELD, HENRY W. CORBETT, JOHN CONNOR, J. P. O. LOWNSDALE, MILLARD O. LOWNSDALE, RUTH A. LOWNSDALE AND MARY E. COOPER.

CIRCUIT COURT, DISTRICT OF OREGON,
AUGUST 9, 1870.

1. CHILDREN OF SETTLERS UNDER DONATION ACT.—Under section 4 of the Donation Act (9 Stat. 497), upon the death of the wife of the settler, after compliance with the law, and before patent issues, the share of the wife is granted by the Act to her husband and children, and they take as donees of the United States, and not as heirs of such wife.

Opinion of the Court—Deady, J.

[August,

2. **DEED BY TENANT IN COMMON GOOD AGAINST HIMSELF.**—A deed by a tenant in common for his interest in a particular part of the land held in common, although void as against his co-tenants, is good against himself and those claiming under him.
3. **IDEM.**—A deed by which Daniel H. bargained, sold, etc., all his right, title, interest, claim and demand to block 252 in the city of Portland, only passed to the purchaser the one fifth interest in the premises which Daniel H. then had.
4. **COVENANTS CANNOT ENLARGE THE PREMISES OF DEED.**—Where such deed contained a covenant to warrant and defend said *lands* to the purchaser, it must be construed to mean only the right, title and interest in such lands, bargained and sold by said Daniel H.; the covenants cannot enlarge the premises of a deed.
5. **IDEM.**—A covenant to warrant and defend the bargained premises against all persons, except the United States government, or those deriving title therefrom, does not estop Daniel H. or his heirs from claiming title to an interest in the premises subsequently purchased from Isabella E. Potter, a donee of the United States.
6. **EFFECT OF DECREE OF AUGUST 12, 1865.**—The effect of the decree of August, 12, 1865, in the suit for partition of the Nancy Lownsdale tract, considered and declared, as between the heirs and vendees of Daniel H. in any particular tract allotted to them according to their respective interests.

Before DEADY, District Judge.

W. Lair Hill and *W. W. Page*, for complainants.

Erasmus D. Shattuck, for defendants.

DEADY, J. This suit was commenced August 7, 1869, for partition of block 252, in the city of Portland, and to apportion and provide for the payment of a certain lien thereon of \$1,423.92.

On October 2, 1869, the defendants, Wakefield, Connor and Corbett, demurred to the bill for misjoinder of parties defendant and for multifariousness, because such defendants were not all interested in the whole premises, but only in separate and different portions of it. After argument the demurrer was overruled for the reason that as the lien for the owelty extended to the whole premises, it was necessary and proper to make all persons interested in any part of the premises defendants, and partition the whole premises in one suit, so as to enable the Court to completely apportion and provide for the extinguishment of the lien aforesaid.

Afterwards, on January 27, 1870, the defendants, Wake-

1870.]

Opinion of the Court—Deady, J.

field and Connor, answered the bill jointly and thereby claimed to be the sole owners of the northerly half of the premises, and the defendant, Corbett, answered separately, claiming to be the sole owner of the southerly half thereof. To these answers the plaintiffs filed general replications. The other defendants, being united in interest with the plaintiffs, made no defense to the bill.

On May 24, 1870, the cause was heard upon the bill, answers and replications and the testimony of the parties taken orally before the Court. From these it appears:

I. That the plaintiffs, John R. Lamb and Emma Lamb, his wife, and Ida Squires, her sister, are citizens of the State of Kentucky, and the defendants are citizens of the State of Oregon; and that the said Ida and Emma are the daughters of Sarah M. Squires, who died prior to 1856, and that said Sarah M. was the daughter of Daniel H. Lownsdale, who died intestate, May 4, 1862; and that the defendants, Mary E. Cooper, J. P. O., Ruth A. and Millard O. Lownsdale, are the children of said Daniel H.

II. That Daniel H. Lownsdale and Nancy, his wife, were settlers upon the public lands in Oregon, under the act of Congress of September 27, 1850, commonly called the Donation Law, and that before March 12, 1858, and before the issue of a patent to said settlers for said land so settled upon, said Nancy died intestate, and thereupon said Daniel H., as the husband of said Nancy, and William Gillihan, and Isabella Ellen Potter and Ruth A. and Millard O. Lownsdale, as the children of said Nancy, under and by virtue of section 4 of said act, became seized in fee simple as tenants in common of an undivided one fifth, each, of the west half of the land so settled upon, containing a fraction over 89 acres, and including the premises in controversy, and commonly called the Nancy Lownsdale tract; and afterwards, on June 6, 1865, a patent to the lands so settled upon was duly issued by the United States, granting the east half thereof to said Daniel H., and the west half thereof to said Nancy, their heirs and assigns respectively.

III. That on March 12, 1858, said Daniel H., by his deed, duly executed for the consideration as therein ex-

pressed of \$600, “bargained, sold, assigned, transferred and conveyed to Alexander Hamilton all his right, title, interest, claim and demand, either in law or equity,” to the premises in controversy, described by metes and bounds as “block numbered 252,” “upon the extended plat of the city of Portland,” as well as the south half of block 253 on said plat. The deed contained the following and only covenant by said Daniel H.: “And I hereby guarantee to warrant and defend said lands to said Hamilton, his heirs and assigns forever, against the lawful claims of all persons *except the United States government or those claiming title from said government*,” and on January 23, 1860, Isabella Ellen Potter, aforesaid, and her husband, by their joint deed, duly executed, among other things, “released and quitclaimed” unto said Daniel H. “all their estate, right, title and interest” in the said Nancy Lownsdale tract; and on February 14, 1860, said Daniel H., by his deed, duly executed, among other things, “released and quitclaimed” unto Hannah Smith all his “right, title and interest” to two undivided fifths of the interest in said Nancy Lownsdale tract, conveyed to said Daniel H. by the deed of Isabella Ellen Potter and her husband, aforesaid; and on February 23, 1869, said Hannah Smith and her husband, Hiram Smith, by their joint deed duly executed, for the consideration as therein expressed of \$1,065, “released and quitclaimed” unto the defendant, J. P. O. Lownsdale, all their “right, title and interest” to the aforesaid two undivided fifths of the interest in said Nancy Lownsdale tract, released to said Hannah Smith by said Daniel H. as aforesaid.

IV. That on August 12, 1865, in a suit brought for the partition of said Nancy Lownsdale tract, by said William Gillihan against one William A. Abbott and others, including all the heirs of said Daniel H. and Nancy, and the parties hereto, except the defendants Wakefield, Connor and Corbett, a decree for partition and the payment of owelty, was duly given and entered by the Circuit Court of the State for the county of Multnomah, and that in and by said decree, which remains in full force and effect, it was adjudged and determined, that said Daniel H. in his life time

1870.]

Opinion of the Court--Dedy, J.

was the owner of two undivided fifths of said tract, and that the other three-fifths thereof belonged to said William Gil-
lihan, Millard O. and Ruth A. Lownsdale; and that by said
decree, certain portions of said tract were allotted and set
apart in severalty to said William, Millard O. and Ruth A.,
and the remainder thereof was set apart in gross to the heirs
or vendees of said Daniel H., according to their respective
interests therein, whatever they might be; and because of
the inequality in the quantity and value of such partition,
as between the children of Nancy Lownsdale and the heirs
and vendees of said Daniel H., it was further adjudged and
determined by said decree, that the portion or parcels
allotted to the latter should pay to the former the gross sum
of \$39,156 02, owelty, to be distributed among and imposed
upon such parcels in proportion to their respective value,
and that \$1,423 92 of said gross sum was, by said decree,
assessed upon said block 252 and made a lien thereon in
favor of the heirs of said Nancy aforesaid.

V. That whatever interest said Hamilton acquired in the
premises in controversy, by the deed of March 12, 1858, of
Daniel H., has been since acquired by said Wakefield and
Connor in the northerly half thereof and by said Corbett in
the southerly half thereof, by means of good and sufficient
conveyances from said Hamilton and his grantees to said
Wakefield, Connor and Corbett; and that, at the date of the
partition by the decree aforesaid, the interest in the prem-
ises conveyed by said Daniel H. to said Hamilton, as afore-
said, was owned by said Abbott as the grantee of said
Hamilton; and that said Abbott, or his grantees, have paid
to the children of said Nancy the said sum of \$1,423 92,
assessed upon the premises in controversy, as aforesaid,
and by the terms of said decree, have a lien thereon for the
repayment to them of such sum, in case they should be
ejected from the premises.

VI. That the premises in controversy have been cleared
of stumps and enclosed with a cheap plank or picket fence,
by Hamilton, or those claiming under him, inclusive of
these defendants, but that the same have not been other-
wise occupied or used by them, and that in the meantime,

Opinion of the Court—Deady, J.

[August,

said Daniel in his life time, and the defendant, J. P. O. Lownsdale, as his administrator, has had the general possession of the tract, including said premises; and that the same are now worth, in coin, between five and six thousand dollars.

Two questions arise in this case, and have been argued by counsel:

1. What is the effect of the deed of March 12, 1858, or what interest in block 252, passed by it to Hamilton and those claiming under him—the defendants W., C. and C.; and

2. How did the partition aforesaid affect such interest, if any.

It appears from the facts stated, that at the date of the execution of the deed from Daniel H. to Hamilton, the former had an undivided one fifth interest in the Nancy Lownsdale tract, including the premises described in the deed, and no more. This interest he held as the direct donee of the United States. Upon the death of the wife Nancy, after the completion of the residence and cultivation, and before the issue of the patent, her share of the donation was in effect granted or limited over, by the act, to her husband and children in equal parts. (*Field v. Squires*, Deady's R. 381; sec. 4, Donation Act.)

After some dispute it has been settled that the deed of a tenant in common for a particular part of the premises held in common, although void as against his co-tenant, is good against himself. (*Dennison v. Foster et al.*, 9 Ohio, 130; *Varnum v. Abbott et al.*, 12 Mass. 476; *Stark v. Barrett*, 15 Cal 364.) In the partition, the Court having seen proper to allot this block to the heirs and vendees of Daniel H. according to their respective interests, whatever they might be, his co-tenants at the time of making the deed are without interest in the premises, and therefore the deed is no longer void as to them, but is valid to all intents and purposes.

The granting clause of the deed only purports to convey the then right, title and interest of said Daniel H. in the premises to Hamilton. That interest was an undivided one-fifth. Any interest which Lownsdale might subsequently acquire in the premises would not be affected by a conveyance of his right, title and interest at that time. This

1870.]

Opinion of the Court—Deady, J.

proposition is too plain for argument, and too well settled in this Court to need the citation of authorities.

Afterwards, on January 27, 1860, as has been stated, Daniel H. purchased another one fifth interest in the Nancy Lownsdale tract from Isabella Ellen Potter, two fifths of which he subsequently conveyed to Hannah M. Smith. It follows that at the time of the partition aforesaid the grantees of Hamilton were the owners of an undivided one fifth of block 252, and the heirs of Daniel H. and Hannah M. Smith as his grantee, were the owners of the undivided fifth purchased from Isabella Ellen Potter, unless the covenant in the deed from Daniel H. to Hamilton would bar him or those claiming under him from asserting any claim to such after acquired fifth.

The covenant is to warrant and defend such *lands* (block 252) to said Hamilton, etc. But by the premises of the deed only the *right, title and interest* of Daniel H. is bargained and sold to Hamilton. It is a well settled rule of law that the premises or granting clause of a deed may limit and control the covenants, but the covenants can never enlarge the premises. (2 Wash. R. P. 665; *Blanchard v. Brooks*, 12 Pick, 65; *Comstock v. Smith*, 13 Id. 120; *Field v. Squires*, Deady's R., 379). This being so, the word *lands* in this covenant can have no other effect than the words in the premises of the deed which only describe the right, title and interest that Daniel H. then had in the land.

But there is another conclusive reason why the covenant does not affect the after acquired interest. This covenant is a special one—"against the lawful claims of all persons, except the U. S. Government or those deriving title from said Government." Isabella Ellen Potter obtained this fifth as has been shown from the U. S. Government and her grantee Daniel H., and all those claiming under him as subsequent vendees or heirs, "derive their title from said Government." There can be no pretence then that this covenant applies to this after acquired fifth, or was intended to meet such a case. The parties have expressly excepted the title of the U. S. from the warranty, and this exception left Daniel H. at full liberty to acquire such title to all or any portion of the

Opinion of the Court—Deady, J.

[August,

block and hold and transmit it without restraint or hindrance from this covenant.

The covenant is practically a nullity and absurdity. In any event no effect could be given to it except upon the improbable, if not impossible, contingency, that some person might set up a valid title to the premises other than one derived from the United States—as for instance from Great Britain, Spain or France. As the parties to this deed may be safely presumed to have known that this was originally public lands of the United States, and that no valid title thereto could be derived from any other source than the United States Government, it is difficult to conjecture what was the object intended to be accomplished by this covenant. However that may be, it cannot prevent the plaintiffs from asserting their title to an interest in four fifths of the premises, for two reasons: First, the law acting upon the reasonable presumption that a party does not warrant the title to a greater interest than he sells, will not construe this covenant as being applicable to any other or greater interest in the premises than the undivided fifth thereof then owned by the covenantor and bargained and sold to the covenantee; Second, the title now asserted by the plaintiffs to an interest in such four fifths is derived from the United States Government and therefore expressly excepted from the operation of the covenant. (*Cole v. Hawes*, 2 John. Cases, 203; *Field v. Squires*, Deady's R., 380.)

As to the effect of the partition upon the interests of these parties in this block, the point was considered and decided by this Court in the case of *Fields v. Squires*, (*supra*, 391) and again in *Lamb et al. v. Burbank et al.* (*Ante*, 227) decided at this term. These decisions were to the effect that the parties to the partition neither gained nor lost by it. This is a well established rule in partition, whether it be made by the decree of a Court or by the mutual deeds of the parties. (*Dawson et al. v. Lawrence et al.*, 13 Ohio,* 546.) For instance, the interest sold to Hamilton in block 252, being only one fifth, it was neither increased nor diminished by the partition. The other four fifths of the block belonged to the heirs of Daniel H. and Hannah M. Smith and the children of Nancy—three fifths to the latter. By partition the

1870.]

Opinion of the Court—Deady, J.

children of Nancy were divested of their three fifths interest in this and other parcels of the tract, and this three fifths was by the same means vested in the heirs of Daniel H., in exchange for the two fifths interest of such heirs in the parcels allotted by the decree to the children of Nancy. To this exchange the grantees of Hamilton contributed nothing and took nothing by it. But this partition being unequal as to quantity and value, owelty was given by the decree to Nancy's children as a compensation for such inequality. For the purpose of protecting their individual interests from being sold to pay this owelty, these defendants, or those under whom they claim, have voluntarily paid the same. In making the partition, provision must be made to repay these defendants four fifths of this owelty with interest, or continue their lien for it.

A decree will be entered, to the effect, that the plaintiffs and defendants are seized in fee simple of the premises as tenants in common, and that the interest therein of Emma and Ida, aforesaid, is $\frac{84}{1250}$ each; and that the interest therein of said J. P. O. Lownsdale is $\frac{328}{1250}$; and that the interest therein of said Mary E. Cooper and Millard O. and Ruth A. Lownsdale is $\frac{168}{1250}$ each; and that the interest in the northerly half thereof of said Wakefield and Connor is $\frac{125}{1250}$ each; and that the interest in the southerly half thereof of said Corbett is $\frac{250}{1250}$, and that three commissioners, to be named by the parties or by the Court, be appointed to partition the premises among the tenants to ascertain and report to the Court whether it is practicable so to partition the premises, and whether or not it would be best to sell the premises and apportion the proceeds among the tenants after satisfying the liens thereon, or that the premises should be apportioned as between these defendants and their cotenants, and that the portion in each half of said block allowed to the latter be sold and the proceeds thereof partitioned between them after paying the owelty and the interest thereon due these defendants; and that the case be referred to the Clerk of the Court as a special master to take and state an account between these defendants and their cotenants as to the value of permanent improvements made thereon and taxes paid, if any, by the former.

In re IRWIN DAVIS, IN BANKRUPTCY.

DISTRICT COURT, DISTRICT OF CALIFORNIA,
AUGUST 13, 1870.

1. **BANKRUPTCY—JURISDICTION OF ORDINARY TRIBUNALS.**—The ordinary tribunals are not deprived, by mere force of an adjudication in bankruptcy, of jurisdiction over suits against the bankrupt. The proceedings in such suits may be arrested or controlled by the Bankruptcy Court, when necessary for the purposes of justice; but in the absence of such interference, the jurisdiction of the ordinary tribunals remains unimpaired and their judgments are valid.

Before HOFFMAN, District Judge.

Thompson & Wilson, attorneys for bankrupt.

Hambleton & Gordon, attorneys for assignee.

W. W. Cope, of counsel for respondent.

HOFFMAN, J. In this case, a temporary injunction was granted, on the petition of the assignee, against certain creditors of the bankrupt, restraining them from prosecuting a suit commenced by them in the Fifteenth District Court, to foreclose a mortgage held by them as security for a debt. A rule was also entered, requiring them to show cause why a perpetual injunction should not issue as prayed for by the assignee. On the return day of this rule the parties appeared, and the questions presented by the case were elaborately argued.

The ground on which the assignee desires the interposition of the Court is, that it will be for the interest of the estate that the mortgaged property be sold at private sale, subject to the mortgage, and that by this means the sum of \$1,500, stipulated in the mortgage, be paid as attorney's fees, in case of foreclosure, may be saved. It is suggested, on the other hand, that the property is subject to various liens subsequent to that of the mortgage—that these liens are held by parties absent from the State, and not within reach of the process of this Court; and that, to foreclose

1870.]

Opinion of the Court—Hoffman, J.

and cut off these liens and make a clear title to the purchaser, they must be brought in by publication and constructive service, as provided for by the laws of this State. The amount of the debt and the validity of the lien of the mortgage are not contested; nor is it suggested that any unfair advantage is sought by the proceedings in the State Court.

The right of the mortgagees to the benefit of their security being thus undisputed, and no application being made to compel the creditors to come into this Court to enforce the claims, there would seem no reason for staying the proceedings in the State Court unless the property is about to be immediately sold at a sacrifice.

But of this there is no apprehension. The notices, etc., by publication will require at least six weeks, and the defaults of absent parties and a decree of foreclosure, order of sale, etc., cannot probably be entered in less than two months. During all this time the proceedings will be under the control of this Court, and if the assignee finds an opportunity to make an advantageous sale, he can apply to the Court for leave to do so. If the sale be really advantageous the creditors will have no motive to resist it, their only object being to collect their debt.

It will perhaps be found better for the interests of the estate to suffer the foreclosure suit to proceed in any event. For the proposed purchaser could bid at the sale, receive a clear title from the sheriff, disencumbered of all junior liens in the hands of all persons properly made parties to the suit; and the assignee, and even the mortgagees, if desired, might unite in the deed. The title being thus made perfect, it is to be presumed that the largest possible price would be obtained.

But whatever course it may hereafter be deemed advisable to adopt, I see no reason for now arresting the proceedings of the creditors.

The temporary injunction heretofore issued will therefore be dissolved—but with the reservation to this Court of full power and authority to interfere, and to control or arrest the proceeding whenever it shall appear expedient for

Opinion of the Court—Hoffman, J.

[August,

the interests of all concerned that it should exercise the power given to it by law, to assume the exclusive administration of this portion of the bankrupt's estate.

As this disposition of the matter is understood to be satisfactory to the assignee, it is perhaps unnecessary to consider the question raised at the hearing. But as the counsel have agreed those questions at length, and have requested of the Court an expression of its opinion, I shall proceed to state the conclusions at which I have arrived.

It is contended that the Court of Bankruptcy has not only complete jurisdiction over the estate of the bankrupt, and the authority to determine all cases and controversies between the bankrupt and his creditors, to ascertain, liquidate and enforce liens, to adjust priorities and conflicting interests of all parties, to marshal and dispose of and distribute, assets, etc., etc., but that this authority is exclusive, and that the adjudication in bankruptcy, *proprio vigore*, divests the ordinary tribunals of all jurisdiction over the bankrupt or his estate, and that all further proceedings before those tribunals are *coram non judice*, and void, notwithstanding that the Court of Bankruptcy has refused to enjoin the parties from further proceeding in them, and notwithstanding that it may clearly be most just, convenient and for the interests of all parties that the suit before the ordinary tribunals should be prosecuted to a final judgment.

I am clearly of opinion that this view cannot be sustained, and that is not the intention of the Act to deprive the Court of the right to avail itself of the aid of the ordinary tribunals, whenever convenience and the interests of the parties may require.

There is, unquestionably, much force in the criticisms contained in the dissenting opinion of Mr. J. Catron, in the cases of *ex parte Christy and Norton's Assignee v. Boyd* (3 How. 322 and 437).

In the former case, the Supreme Court sustained the jurisdiction of the District Court to entertain a bill to set aside a sale under a decree of foreclosure rendered in the State Court before the adjudication in bankruptcy.

1870.]

Opinion of the Court—Hoffman, J.

Mr. Justice Catron contends that such a proceeding could only be sustained on the ground that the sale under the decree of foreclosure was absolutely void—and that the mortgage lien on which the decree was entered could be enforced only in the Bankruptcy Court. If this be the true construction of the opinion of the Supreme Court, it would go far to sustain the proposition contended for in this case, viz.: that the adjudication in bankruptcy absolutely divests the ordinary tribunals of jurisdiction over all matters cognizable in the Bankrupt Court. But in the succeeding case of *Norton's Assignee v. Boyd*, clearly show that the Court did not intend so to decide. In that case, as in the former, a decree of foreclosure had been obtained, and execution issued and levy made, before the adjudication in bankruptcy. The sale took place after the adjudication. The assignee filed his bill to set aside this sale on the ground that the District Court of the United States was by the bankrupt law vested with exclusive jurisdiction over all matters pertaining to the settlement of the affairs of the bankrupt, and that the sale made by the State Court had transferred no legal title to the property, which still remained that of the bankrupt or his assignee, to be sold or otherwise disposed of under the orders of the District Court.

It will be perceived that the question was thus distinctly raised, whether after the adjudication the proceedings in a State Court to enforce a lien, were void, and whether the jurisdiction of the Bankrupt Court was exclusive.

The Circuit Court dismissed the bill for want of equity, and the Supreme Court, on appeal, affirmed the decision.

In the opinion of the Circuit Court, which is approved and adopted by the Supreme Court, the opinion is expressed that on grounds of expediency the jurisdiction of the Bankruptcy Court should be exclusive, so as to take away from the State Court any jurisdiction in such cases. As to this, the Supreme Court says: "Upon this subject it is not our province to decide, and we have no desire to express an opinion upon it."

Mr. Justice Catron contends that this decision is inconsistent with the previous decision in *Ex parte Christy*. However

Opinion of the Court—Hoffman, J.[August,

this may be, the case is a direct authority for the position that a sale made after an adjudication in bankruptcy, under a decree of a State Court to enforce a lien, is not void—and to be treated as such in all cases by the Bankruptcy Court. And, further, that the Supreme Court declines to express an opinion whether on grounds of expediency the jurisdiction of the District Court should have been made by laws *exclusive*. That such was the understanding of the Court in *Ex parte Christy*, appears from the language of Mr. Justice Story, in delivering the opinion of the Court:

“It is further objected that if the jurisdiction of the District Court is as broad and comprehensive as the terms of the act justify according to the interpretation here insisted on, it operates, or may operate, to suspend or control all proceedings in the State Courts, either then pending or thereafter to be brought by any creditor or person having an adverse interest to enforce his rights or to obtain remedial redress against the bankrupt or his assets after the bankruptcy. We entertain no doubt that under the provisions of the sixth section of the Act, the District Court does possess full jurisdiction to suspend or control such proceedings in the State Courts, not by acting on the Courts over which it possesses no authority, but by acting on the parties through the instrumentality of an injunction or other remedial proceedings in equity, upon due application made by the assignee and a proper case being laid before the Court requiring such interference. Such a course is very familiar in Courts of Chancery, in cases where a creditor’s bill is filed for the administration of the estate of a deceased person, and it becomes necessary or proper to take the whole assets into the hands of the Court for the purpose of collecting and marshalling the assets, ascertaining and adjusting conflicting priorities and claims, and accomplishing a due and equitable distribution among all parties in interest in the estate. Similar proceedings have been instituted in England in cases of bankruptcy, and they were, without doubt, in contemplation of Congress as indispensable to the practical working of the bankrupt system. But because the District Court does possess such

1870.]

Opinion of the Court—Hoffman, J.

a jurisdiction under the Act, there is nothing in the Act which requires that it should in all cases be absolutely exercised. On the contrary, where suits are pending in the State Courts, and there is nothing in them which requires the equitable interference of the District Court to prevent any mischief or wrong to other creditors under the bankruptcy, or any waste or misapplication of the assets, the parties may well be permitted to proceed in such suits and consummate them by proper decrees and judgments, especially where there is no suggestion of fraud or injustice on the part of the plaintiffs in those suits. The Act itself contemplates that such suits may be prosecuted and further proceedings had in the State Courts, for the assignee is, by the third section, authorized to sue for and defend the property vested in him under the bankruptcy, subject to the orders and directions of the District Court, and all suits at law and in equity then pending in which such bankrupt is a party, may be prosecuted and defended by such assignee to a final conclusion in the same way and manner, and with the same effect as they might have been by the bankrupt.” “So that here the prosecution and defense of any such suits in the State Courts is obviously intended to be placed under the discretionary authority of the District Court, and in point of fact, as we all know very few, comparatively speaking, of the numerous suits pending in the State Courts at the time of the bankruptcy, ever have been interfered with, and never unless some equity intervened which required the interposition of the District Court to sustain or protect it.”

The act of 1867 gave a legislative sanction to this exposition of the duties and jurisdiction of the District Courts in Bankruptcy, and the language of the Supreme Court is adopted and embodied in the act.

Congress must also have been aware of the suggestion of the Circuit Judge, in *Norton's Assignee v. Boyd*, that on grounds of expediency the jurisdiction of the District Court ought to be exclusive, a suggestion which the Supreme Court declined to approve. But the act contains no provision to the effect suggested by the Circuit Judge, and it is evident that it was intended to leave the jurisdiction as it stood under the act of 1841, as expounded by the Supreme Court.

The provision in the fourteenth section, which authorizes the assignee to prosecute and defend all suits pending at the time of the adjudication in which the bankrupt is a party, is inconsistent with the idea that, by the adjudication, the ordinary tribunals are divested of all jurisdiction over the bankrupt or his estate—while to attribute such an effect to the adjudication would be productive of extreme hardship and injury to the bankrupt, or it might to strangers in no way connected with him.

At the time of the bankruptcy, suits may be pending to determine the title to land, to enforce trusts, to foreclose mortgages to effect partitions, to take accounts of partnerships, to remove clouds from titles, etc., etc., to which the bankrupt was a necessary or indispensable party. The litigations may have been protracted and expensive. To hold that by the fact of adjudication, all power of the ordinary tribunals to bind the bankrupt or his estate by a final judgment or decree in any such suits is taken away, would be to subject the parties to an intolerable hardship, for no conceivable object. Nor is it clear what relief could be afforded by the Bankruptcy Court, for the property in litigation might be in another district and beyond the jurisdiction of the Court, and the parties might have no connection with the bankrupt either as debtors or creditors, and thus be in no way concerned in the bankruptcy proceedings.

In the case of *Sedgwick v. Minck et al.* (1 B. R. 204), where the bankrupt had, long previously to the passage of the act, made an alleged fraudulent assignment of his property and creditors had filed bills to set aside the assignment, which suits were pending at the time of the bankruptcy, Judge Nelson refused to interfere, observing, that the question involving “the right to the property is in the State Court, where it belongs, and the decision of that Court will be conclusive upon the right. If in affirmance of the judgment of the Court below, the property will be applied to the satisfaction of the judgments on the creditors’ bill; if in favor of the validity of the assignment, it will take the direction of the trusts created in the assignment. The right to this property attached long before the assign-

1870.]

Opinion of the Court—Hoffman, J.

ment in bankruptcy, and before even the passage of the Bankrupt Law." This case affords a striking illustration of the injustice and inconvenience of an opposite doctrine.

The provision in the twenty-first section, that no creditor whose debt is provable under the act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, was evidently intended merely to subject such suits to the control of the Bankruptcy Court, and to enable that Court to stay them "whenever required, to prevent mischief or wrong to other creditors or waste or misapplication of assets." But it was not intended to declare, that the adjudication in bankruptcy *proprio vigore* should divest the ordinary tribunals of jurisdiction, and that all subsequent proceedings should be *coram non judice* and void, even when taken with the assent of the Bankruptcy Court and when clearly necessary to protect and enforce the rights of third parties.

The provision, that the suit shall be stayed by the Bankruptcy Court *until the determination of the question of discharge, provided there be no unreasonable delay* on the part of the bankrupt in endeavoring to obtain his discharge, and provided, that if the amount due the creditor is in dispute, the suit may, by leave of the Court in Bankruptcy, proceed to judgment for the *purpose of ascertaining* the amount due, clearly indicate that Congress did not intend to divest, in all cases, the ordinary tribunals of jurisdiction, after an adjudication in bankruptcy; and the provision authorizing the assignee to defend all suits pending against the bankrupt, shows that it was contemplated that such suits might be continued and carried to judgment after the adjudication and the appointment of an assignee.

On the whole, my opinion is, that the jurisdiction of the ordinary tribunals over suits to which the bankrupt is a party, is not taken away by mere force of the adjudication; that the Bankruptcy Court has jurisdiction to suspend or control such proceedings, by acting on the parties; but that, in the absence of such interference, the jurisdiction of the State Courts remains unimpaired and their decrees and judgments are valid and effectual.

ALBERT ZEIBER v. ANDREW HILL, Assignee of
Thomas Martin.

DISTRICT COURT, DISTRICT OF OREGON,
AUGUST 15, 1870.

1. **BANKRUPTCY—DISSOLUTION OF ATTACHMENT.**—An adjudication in bankruptcy relates to the filing of the petition, and works a dissolution of an attachment before then levied upon the bankrupt's goods from that date.
2. **OFFICER'S FEES.**—An officer must look to the party, or his attorney, who employed him for his fees; he has no claim upon the adverse party.
3. **DUTY OF REGISTER AS TO BANKRUPT'S PROPERTY.**—Where a debtor is adjudged a bankrupt upon his own petition, it is the duty of the register to take his property into his custody by the intervention of an agent, or other proper means.
4. **KEEPER'S FEES ON DISSOLUTION OF ATTACHMENT.**—Where a debtor was adjudged a bankrupt upon his own petition, and prior to the filing thereof a flock of sheep belonging to him had been taken on an attachment and kept by the officer until delivered to the assignee: *Held*, that such officer is entitled to a compensation from the assignee for keeping such sheep, until claimed and received by the assignee.

Before DEADY, District Judge.

E. C. Bronaugh, for plaintiff.

Charles A. Ball, for defendant.

DEADY, J. On July 12, 1870, the parties to the above entitled cause filed a statement of facts upon which the controversy between them depends, and submitted the same to the determination of this Court without action. (Or. Code, 202.)

On August 8, the case was argued by counsel for plaintiff, and submitted without argument for defendant.

From the statement it appears that on April 4, 1870, one Croft commenced an action against Thomas Martin, aforesaid, in the County Court for Multnomah County. On the same day an attachment issued in the action and was received by the plaintiff, then Sheriff of the county aforesaid, and levied among other things upon 149 head of sheep and 550 pounds of meat. On April 5, plaintiff sold the meat as

1870.]

Opinion of the Court—Dedy, J.

perishable property for \$24.94, and put the sheep into the custody of a keeper, where they remained twenty-six days, when they were delivered to the defendant as assignee as aforesaid.

On April 5, said Martin filed his petition in this Court to be adjudged a bankrupt, and on April 8 was so adjudged by the Register. On April 15, Croft obtained judgment in the County Court for \$405, and on April 19 execution issued thereon against the property of Martin directed to plaintiff. On April 28, plaintiff was restrained by injunction from the Court from selling Martin's property on execution, and thereupon plaintiff delivered said property to defendant as aforesaid, and returned the execution unsatisfied.

That the plaintiff paid said keeper for keeping said sheep during the period aforesaid the sum of \$2 per day, or \$52 in all, which was a reasonable reward for his services; and that the said plaintiff has not received payment for said sum so expended, or any part thereof, except said sum of \$24.44, which he still retains.

The adjudication in bankruptcy related back to the filing of the petition of April 5, and dissolved the attachment from that day. An officer must look to the party, or his attorney who employs him, for his fees. He has no claim upon the adverse party for them. Croft obtained nothing by his judgment in the County Court, and he must pay the fees earned by the officers at his instance, without having any recourse upon Martin or his property. Upon Martins' being adjudged a bankrupt, the Register should have taken his property into his custody by the intervention of an agent and other proper means, and kept it for the assignee when appointed. However, at that time there appears to have been some doubt as to his power to do this, and it was not done. The consequence was, the sheep remained in the plaintiff's custody, and he incurred this expense in keeping them.

I think upon general principles that the plaintiff is entitled to a reasonable reward for keeping these sheep. For this purpose he may be considered as a bailee, and entitled to compensation as any other agister or feeder of cattle.

Opinion of the Court—Deady, J.

[August,

The cases *In re Houseberger et al.* (2 Bank. Reg. 33) and in *In re Williams* (Id. 79), sustain this conclusion, while the first case goes even farther, and probably too far. I have found no case to the contrary. The plaintiff is entitled to judgment on the statement for the sum expended, after deducting the amount of money in his hands belonging to the estate, to wit, \$27.04.

LEWIS STARR v. BENJAMIN STARK.

CIRCUIT COURT, DISTRICT OF OREGON,
AUGUST 16, 1870.

1. **FORMER SUIT WHEN BAR TO ANOTHER.**—Where, in a suit to quiet title, one of the grounds of the relief sought is abandoned by the complainant because adjudged to be inconsistent with another ground of relief alleged in his complaint, and such suit is finally determined adversely to the complainant, he is barred from maintaining another suit for the same relief upon such abandoned ground.
2. **ALL MATTERS AFFECTING TITLE DETERMINED.**—A suit to ascertain and quiet title under section 500 of the Code, extends to, and includes all the grounds of controversy between the parties as to the title to the premises; and by the final decree therein all matters affecting such title are determined.
3. **A BAR TO OTHER SUITS FOR SAME RELIEF.**—A plaintiff in such suit cannot, at his option, split it up into many suits, and if he omits to set forth and prove all the grounds of his right, or his adversary's want of it, he cannot afterward bring another suit upon the fragment or portion of the case omitted.

Before DEADY, District Judge.

THIS was a motion for a provisional injunction to stay the enforcement of a judgment at law for the recovery of the possession of real property.

David Logan, for motion.

Wm. Strong, contra.

DEADY, J. In January, 1864, the plaintiff herein and his brother, Addison M., commenced a suit in equity in the

1870.]

Opinion of the Court—Deady, J.

Circuit Court of the State for the county of Multnomah, against the defendant herein, alleging themselves to be the owners and in possession of lots 1, 2 and 4 in fractional block 81 in the city of Portland, and that the defendant claimed title thereto adverse to the plaintiffs and threatened them with an action to recover the possession thereof, with a prayer that the defendant be compelled to set out by what title he claims said property, and that the rights of the plaintiffs and defendant might be determined by the Court. The complaint in said suit also set forth the grounds of the plaintiffs' right to the premises to be certain agreements, representations and doings of the defendant, whereby, as plaintiffs claimed, he was in equity bound to convey to them the legal title which he had acquired from the United States as a settler under the Donation Act of September 27, 1850.

On August 20, 1864, the plaintiffs in pursuance of previous proceedings in the cause, filed an amended complaint, setting forth the facts aforesaid, and also that the defendant claimed title to the premises by virtue of a patent therefor issued to him by the United States on December 8, 1860. The amended complaint also alleged that, in pursuance of certain proceedings in the proper land office, a patent was issued by the United States on December 7, 1860, to the corporate authorities of Portland for a certain tract of land, including the premises in controversy, in trust for the occupants thereof, and that plaintiffs had been the occupants of said premises since December 13, 1849, and are entitled to the benefit of said patent to said corporate authorities; and further, that the said defendant contriving and intending to defraud plaintiffs out of the premises falsely, procured it to be established and proved before the Surveyor-General of Oregon that he had resided upon and cultivated the land described in his patent for four years prior to September 10, 1853; he, the said defendant, then well knowing that he had not then so resided upon and cultivated said land—wherefore the plaintiffs prayed that the defendant's patent might be set aside and held for naught, and that defendant be compelled to release to plaintiffs all his right, title and interest in the premises, and be forever restrained

Opinion of the Court—Deady, J.

[August,

from setting up any title to the same by means of the premises and for other relief.

Afterward, on August 23, defendant demurred to the amended complaint, and on October 15, the Court made an order sustaining the demurrer to all that portion of such complaint concerning the patent to the corporate authorities of Portland, and the fraud in obtaining the defendant's patent and the claim of the plaintiffs by reason thereof, and on October 28 the Court made an order vacating the last named order, and directing that the plaintiffs have leave to amend their complaint and requiring them to elect which cause of suit they would proceed upon, and to set forth the same in the amended complaint.

On November 1, the plaintiffs, in pursuance of the last named order, filed a second amended complaint alleging therein as above stated, except that they omitted therefrom the statement and claim set forth in the original complaint that the defendant by reason of certain agreements, representations and doings, was in equity bound to convey the legal title which he held to them and thereby elected to proceed against the defendant upon the ground of the patent to the corporate authorities of Portland, and the fraud and illegality of the patent to the defendant.

On November 25, the defendant answered the second amended complaint, and on December 3, the plaintiff replied thereto.

Afterwards such proceedings were had in the case that said Circuit Court, on June 12, 1865, gave a final decree therein, whereby it was found that the plaintiffs were entitled to the relief prayed for by them, and adjudged that the patent to the defendant of December 8, 1860, as against plaintiff, be declared void and taken for naught, and that the defendant be perpetually enjoined from suing for or ejecting the plaintiff from the possession of the premises in controversy.

Afterwards, on appeal to the Supreme Court of the State of Oregon, said decree was wholly affirmed, and thereafter said cause was taken to the Supreme Court of the United States by said defendant, upon a writ of error, and upon a

1870.]

Opinion of the Court—Deady, J.

hearing thereon at the term of December, 1867, it was adjudged and decreed that said decree be reversed, and that the Supreme Court of Oregon remand the cause to the said Circuit Court with directions to dismiss the suit, which was done accordingly.

Subsequently the plaintiff succeeded to the undivided interest or claim of Addison M. in lots 1 and 2, and the north half of 4, aforesaid; and thereafter, on February 12, 1870, in an action at law commenced and prosecuted in this Court by the defendant against the plaintiff, the former obtained judgment against the latter for the possession of the premises last aforesaid, and for the sum of ——— for the use and occupation of the same, and for costs and disbursements of the action.

On February 18, 1870, the plaintiff commenced this suit to have the defendant enjoined from enforcing that judgment or maintaining any action against the plaintiff for the possession of the premises, and to have the Court adjudge and declare, as against the defendant, that the plaintiff is the owner of the premises, and to compel the defendant to release to plaintiff his title thereto, acquired by virtue of the Donation Act and the patent aforesaid, issued to him thereunder.

The bill in this suit sets forth, as in the former suit, that by reason of certain agreements, representations and doings of the defendant, which are stated in detail, he, the defendant, is in equity bound to release or convey to the plaintiff the legal title to the premises which he acquired as aforesaid, but makes no mention of the patent to the corporate authorities of Portland, or claim for the plaintiff thereunder, nor does it contain any charge against the validity of the patent to the defendant, but in terms admits that the latter has obtained the legal title to the premises as a settler under the Donation Act.

On February 19, a notice of motion for preliminary injunction was served on the defendant. The hearing of the motion was postponed from time to time by agreement of counsel until June 23, when the same was argued and submitted with a stipulation that the defendant would take no

steps to enforce the judgment while the motion was held under advisement.

Counsel for the defendant makes two objections to the granting of the preliminary injunction:

1. That there is no equity in the bill, or in other words, that it does not appear from the facts stated that the defendant is under any obligation or ought to be compelled to convey his title to the plaintiff; and,

2. That the subject matter of this suit—the title to this property—was fully adjudicated between these same parties in the suit of Lewis M. and Addison M. Starr against this defendant, above stated, and that by the final decree of the Supreme Court of the United States, given in said suit, it was determined and adjudged that the legal title to the premises was in the defendant, and that neither the plaintiff nor said Addison M., had any interest, legal or equitable, therein.

Upon the question raised by the first objection, I do not propose to pass in the consideration of this motion. The title to other property is now in litigation before this Court between other parties upon the construction and effect to be given to the same acts and circumstances out of which the plaintiff claims that his equity arises.

As to the question made by the second objection, it must be decided in favor of the defendant. After deliberate consideration, I am well satisfied that the former adjudication between these parties is a bar to this suit, and that therefore the motion for injunction ought not to be allowed.

Counsel for the plaintiff seeks to avoid this conclusion by ingeniously attempting to liken this to a case, where a party has two distinct causes of action which he might have joined in one action, and did not; or having done so, abandons one of them on or before trial. Now this is a suit to determine the title to this property as between these parties, and so was the former one. True, the grounds of this suit, as stated in the bill, are not the same as those of the former suit were at the time it was decided. In that suit, the plaintiffs shifted their ground, so that it was commenced upon one ground and finally heard and determined upon

1870.]

Opinion of the Court—Dedy, J.

another. At the beginning, they relied upon their right to a conveyance of the legal title from the defendant, the same as in this suit. Afterwards they amended their bill and added the other ground, wherein they claimed independently of the defendant, under what is called the city patent and town site law. Then followed the order of the Court, requiring them to elect which of these two inconsistent grounds they would proceed upon, when they abandoned the first and prosecuted the suit to final determination upon the second.

It seems to me, that the order of the Circuit Court, requiring the plaintiffs to elect which cause of suit they would proceed upon, is an adjudication that one or the other of these causes of suit was insufficient, because, in the nature of things, it was impossible that both could be true in fact and law, and that the plaintiffs should determine which one was insufficient, by electing to proceed upon the other. This election is in the nature of a solemn admission of record, that the alleged cause of suit then abandoned and now sought to be re-adjudicated, was not well founded in fact or law, or both.

Again, when this cause was appealed to the Supreme Court of the State, it went there as an equity case, to be tried anew upon the transcript and evidence. If the plaintiffs conceived that the Circuit Court erred in requiring them to make this election, and thereby abandon one ground for the relief sought by them, and did not desire to acquiesce in such decision, they should have sought redress on the appeal. Having abandoned the cause of the present suit in the course of the former one, in obedience to an order, which, in effect, determined the cause of suit was insufficient, and having thereafter submitted to that order, the plaintiff cannot have the same matter re-adjudicated in another suit.

But waiving this view of the subject, and assuming that the present cause of suit had never been stated or brought to the notice of the Court in the former suit, still the adjudication in that suit would be a bar to this.

The suit of Lewis M. and Addison M. Starr against the defendant was brought by them as persons being in possession of the premises under section 500 of the Code :

Opinion of the Court—Deady, J.

[August,

“Any person in possession by himself or his tenant, of real property, may maintain a suit in equity against another, who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest.” (Or. Code, 273.)

The suit given by this section, is one to ascertain and quiet the title to the premises, as between the parties. The plaintiff cannot, at his option, split it up into many suits, with which to harass and weary the defendant. By the final decree in such a suit, the title to the premises, as between the parties, is determined, and all questions or matters affecting such title are concluded thereby. If either party omits to set forth and prove all the grounds of his right, or his adversary's want of it, he cannot correct his error by bringing another suit upon the portion or fragment of the case omitted. In the suit between the Starrs and the defendant, the latter claimed, adversely to the plaintiffs, the whole estate or interest in the premises, whether legal or equitable. The suit was brought to try and determine such claim, and might have resulted in a determination of the question either for or against the defendant. In either event, the controversy is ended and the matter at rest between the parties. Whatever matter of fact or law the plaintiffs could allege or maintain to show the falsity or illegality of the defendant's claim, they were at liberty to do in the former suit. If they failed to bring to the consideration of the Court, by proper proof or allegation, anything material to a correct determination of the controversy for which such suit was given and brought to settle, it was their own fault, and they must abide by the consequences. Already the defendant has been in Court once, at the call of the plaintiff concerning his claim to these premises, and successfully answered whatever was alleged against him. After years of litigation, the judgment of the Court of last resort was given in his favor, and now the plaintiffs seek to compel him to submit to a re-adjudication of his claim upon a fragment of the former suit, which was lost and abandoned by the plaintiffs in the progress of the former trial.

I am clear, that the matter is *res judicata*. The motion is denied, with \$20 costs.

THE UNITED STATES v. WILLIAM K. SMITH.

DISTRICT COURT, DISTRICT OF OREGON,
AUGUST 22, 1870.

1. **RIGHT TO CHALLENGE A JUROR.—WAIVES.**—Where a defendant is informed by the examination of a juror that he has had a conversation with a third person about the case, and makes no challenge on that ground, but accepts the juror, he cannot afterwards object to the verdict on that account.
2. **NEW TRIAL.—NEWLY-DISCOVERED EVIDENCE.**—Applications for new trials on the ground of newly-discovered evidence, are liable to great abuse, and are therefore regarded with jealousy and construed with great strictness.
3. **IDEM.—WHEN IT WILL BE GRANTED.**—To entitle a defendant to a new trial on the ground of newly-discovered evidence, it must appear, (1) that the *party* has discovered the evidence, or that it has come to his knowledge since the last trial, and (2) that it is so material that it would probably produce a different verdict if the new trial were granted.
4. **PROFITS ON STOCKS.—TAXABLE INCOME.**—The successive acts of Congress, from that of August 5, 1861 (12 Stat. 309), to that of March 2, 1867 (14 Stat. 479), upon the subject of taxing incomes, construed as being *in pari materia*, and requiring a return for taxation as income of all gains derived from the sale of corporation stocks in 1868, if purchased at any time after August 5, 1861.
5. **EXCHANGE NOT A SALE.—PROFITS ON NOT TAXABLE.**—A *bona fide* exchange of stocks for other property, however much to the apparent advantage of the owner of the stocks, is not a sale thereof, from which profits are derived liable to taxation as income.
6. **TRANSFER OF STOCKS.—WHEN A SALE.**—A transfer of stocks for a promissory note, which is collectable, or an exchange thereof for land, followed by a sale of such land within the year, for collectable promissory notes, is to be considered a sale of such stock for so much cash.
7. **CORRUPT INTENT.—PERJURY.**—Although the affidavit of a party to his income return be false, he cannot be convicted of perjury thereon, unless it was made with a corrupt intention, and therefore, if such party, as a matter of law or fact, honestly believed that he was not bound to return any profits from the sale of stocks, for taxation, then, although he was mistaken and his affidavit in this respect false, he cannot be convicted of perjury.
8. **INCOME TAX JUST AND EXPEDIENT.**—The tax upon incomes is both just and expedient, and the objection that it is inquisitorial applies with equal force to the State law which provides for imposing a direct tax upon all the articles of property of which a person is possessed.
9. **CORRUPT INTENT, QUESTION FOR JURY.**—Upon an indictment for perjury, whether the oath was knowingly and corruptly false, is a question for the jury, and the Court will not set aside their verdict thereon, unless it is clearly against the weight of evidence.

Statement of the Case.

[August,

10. PERJURY IN SWEARING TO INCOME RETURN.—Although the Act imposing a tax upon incomes (14 Stat. 479) makes no provision for *compelling* a person to make oath to his return of income, yet it *permits* him to do so, and if he avails himself of the privilege, and intentionally swears falsely, he is guilty of perjury. (13 Stat. 239.)
11. PROFITS ON STOCKS TAXABLE FOR WHAT YEAR.—The profits made upon a sale of stocks in 1868 were taxable as income for that year, without reference to the year in which the increase in the value of the stocks occurred, so that it was subsequent to the Act of August 5, 1861 (12 Stat. 309) imposing a tax on incomes.
12. INTENT, QUESTION FOR JURY.—Whether a false oath was taken under mistake as to the law or fact involved therein, is a question of fact for the jury.
13. NEW TRIAL SURPRISE.—A new trial will not be granted upon the ground that the evidence of a witness took the party by surprise, unless it appears that such surprise is in no degree attributable to the negligence of such party.
14. PERJURY—PUNISHMENT.—The circumstances under and for which perjury was committed, considered with reference to the punishment proper to impose upon a party convicted thereof.

Before DEADY, District Judge.

ON August 6, 1869, the defendant was indicted for the crime of perjury, in swearing to his income return. (4 Stat. 118; 12 Stat. 309.) The indictment alleged in substance and effect that the defendant on March 22, 1869, made an affidavit before the assistant assessor of the fourth division of the district aforesaid, that a certain statement then made by him contained a full, true, particular and correct account of defendant's income subject to income tax for the year 1868; and that he had not received, and was not entitled to receive from any and all sources of income together, any other sum for said year beside what was set forth in said statement in detail: whereas, in truth and in fact, said statement did not contain a full, true, particular and correct account of the defendant's income for 1868, subject to an income tax, and that defendant received and was entitled to receive from any and all sources together other sums and a greater sum for the year 1868, besides what was set forth in said statement in detail; and that the defendant at the time of making said affidavit and statement well knew that the same was false.

Upon arraignment, the defendant pleaded not guilty, and

1870.]

Opinion of the Court—Deady, J.

on August 24, and three days thereafter, the cause was tried before a jury, who being unable to agree, were discharged without giving a verdict. Thereupon, on application of the defendant, the cause was continued until the term of March, 1870, when it was again continued by consent of parties until July 12. On the last mentioned date it was tried before a jury who, on July 14, found the defendant guilty as charged in the indictment, and recommended him to the mercy of the Court.

On July 19, a motion for new trial was filed, and on the application of the defendant the hearing was continued until August 5, when it was argued by counsel and submitted.

J. C. Cartwright, for plaintiff.

Wm. Strong and David Logan, for defendant.

DEADY, J. The motion for a new trial is based on the following grounds:

1. Misconduct of James Winston, one of the trial jurors;
2. Newly-discovered evidence;
3. Insufficiency of the evidence to justify the verdict;
4. That the verdict is against law;
5. That the defendant was taken by surprise by the testimony of Mellen, the assistant assessor.

On the first trial, when the prosecution offered in evidence the defendant's statement of income for the year 1868, the defense objected to the proof because the assignment of perjury in the indictment was too general—merely negating the words of the affidavit—while it should have been assigned specially upon some particular fact or matter sworn to by defendant. The Court ruled that the objection should have been taken by motion or demurrer; and that after the plea of not guilty it came too late; but in order to apprise the defense of what particular fact or matter in the statement the prosecution relied upon to show the falsity of the affidavit, the Court required the latter to elect and declare in what particular it expected to prove such statement false. The prosecution then elected to prove the statement

false in subdivisions 5 and 13, relating respectively to income derived “from profits realized by sales of real estate purchased since December, 1868,” and the “profits on the sales of gold or stocks, whenever purchased;” but in fact the evidence was confined to the matter of profits arising from the sale of stocks. On the second trial the same formal proceedings were not had upon this question, but the rule established on the first was followed without question, and the evidence of the prosecution upon this branch of the case was confined to the question of whether or not the defendant had made profits from the sale of stocks during 1868.

The statement of the defendant's income was in the usual form of blank 24, and purported to be a “detailed statement of the income, gains and profits of W. K. Smith, of Salem, Oregon, during the year 1868.” The gross amount of income in currency contained in the statement was \$7,617.14, which was stated in detail under the various subdivisions as follows:

First—From profits in any trade, business or vocation, etc., \$3,849; *Third*—From rents, \$400; *Eighth*—From profits in corporation, not divided, \$766.66; *Tenth*—From interest otherwise than on United States securities, \$640; *Eleventh*—From salary other than as an officer of the United States, \$1,861.48. The deductions amounted to \$1,579.86, leaving the taxable income, returned by the defendant, to be \$5,937.28. No income was returned by the defendant under the subdivisions 5 or 13.

As to the alleged misconduct of Winston, the facts appear to be as follows: Being returned on the venire to serve as a trial juror at the term at which the defendant was to be tried, he was drawn by the clerk in the formation of the jury in this case. Being sworn concerning his qualifications to sit on the jury, on examination by defendant's counsel, he stated that since he was summoned as a juror, and since his arrival in the city, he had a casual conversation with Dr. Cardwell about this case, but that he had no decided opinion as to the merits of it. The defense interposed no challenge, and after some deliberation, accepted the juror, and

1870.]

Opinion of the Court—Dedy, J.

he was sworn. At the same time the Court directed a rule to be entered and served upon the juror, requiring him to appear and show cause why he should not be punished as for contempt, on account of his engaging in conversation with third parties concerning cases pending in this Court after he was summoned to serve therein as a juror. On July 16, two days after the jury had given their verdict, Winston showed cause, and answered that he had had a brief conversation with Dr. Cardwell concerning this case after he was summoned as a juror, which arose in this way: Winston stated to Cardwell that he was here as a juror and would consequently be in the city for some time, when Cardwell remarked that he supposed the case of Smith would come up for trial. Winston replied, by asking what kind of a cause it was? Cardwell answered, that Smith was accused of making and swearing to two different income returns the same year. Winston replied that it must be some sharp practice to get rid of the income tax. Winston also stated that it was in nowise his intention to prejudice his mind in relation to this case or disqualify himself to sit therein as a juror. Upon reading the answer, the Court discharged the rule on payment of the costs by Winston. If a challenge had been submitted to this juror for bias, it might have been allowed, yet it is not beyond question that it should have been. The conversation was casual, and was not introduced by the juror. He appears to be a stranger to the defendant, and an intelligent, fair man; nor is there any suspicion or suggestion that Cardwell was in any way inimical to the defendant, or that he desired to prejudice the juror against him. The information communicated by Cardwell to the juror, and upon which the latter made the remark that he did, was a very general allusion to the case, and not by any means a correct statement of the crime with which the defendant was charged, nor of the facts which constitute it. Swearing to two different income returns for the same year is not in itself a crime, though the fact may tend to convict the party of the crime of perjury in swearing to one or the other of them, if they be *different* in the sense of *contradictory* as well as *distinct*; nor does the re-

mark of the juror about “sharp practice” necessarily indicate that the information then received made an impression upon his mind that the defendant was guilty of *any crime*—let alone that of perjury. Indeed, by the expression *sharp practice* men commonly designate acts or conduct which, although contrary to good morals or the golden rule, are not punishable as crimes by the law of the land.

But the decisive answer to the motion on this ground is, that the defendant accepted this juror with a full knowledge of the fact that he had conversed with Cardwell about the case, and had gotten some impression about it from such conversation. A party who knows of a ground of challenge, and does not seasonably take it, must be deemed to have waived it. (2 G. & W. on New Trials, 247; *Davis v. Allen*, 11 Pick. 467). If the defense supposed that this impression was in their favor, as it is quite likely they did, and accepted the juror on account of it, they took their chance so far for a favorable verdict, and must abide by the result. But counsel for the defense say now, that if they had known the nature of this conversation, they would not have accepted the juror. But counsel are aware that, according to the practice of this Court, the defendant was not entitled to know the particulars of this conversation nor the nature of the impression produced by it, if any. It was sufficient, if the juror disclosed the fact that he had had a conversation upon the subject, and with whom, and whether he had formed an opinion as to the guilt of the defendant from such conversation. But if this were otherwise, the defendant cannot now complain of the want of this information, because the juror was not interrogated on this point. He was only sworn to answer questions touching his qualifications, and he was not bound to volunteer information beyond the scope of the inquiries propounded to him. If the defense accepted this juror in ignorance of the nature of this conversation and the impression produced by it, this is no ground for a new trial. They were either not entitled to such information, or otherwise they neglected to ask for it when they knew of its existence. The defense, as must be presumed, supposing that Winston, notwithstanding the

1870.]

Opinion of the Court—Deady, J.

conversation or on account of it, was comparatively a safe juror for them, accepted him, cannot now be heard to object to the verdict on that account. In the statement of this matter in the motion, it is said that Winston swore on his *voir dire*, that he was an "impartial juror." This is a manifest mistake. Whether the person drawn as a juror is *impartial* between the parties or not, is a question to be tried and decided by the Court, and not the witness. The juror was examined at some length, and the substance of his testimony was, that he had had the conversation as above stated, but had formed no decided opinion as to the guilt or innocence of the defendant. He may have also stated that he thought he could try the case according to the evidence. Counsel sometimes ask such questions, and they are allowed to be answered because not objected to. In any event, I have no doubt that he told the truth, for he learned nothing in such conversation upon which to form any opinion as to whether the defendant was guilty of the crime of perjury. There is no reason to suspect that the juror acted from improper motives, or that any person ever sought to prejudice his mind against the defendant. It was admitted by counsel, on the argument, that the juror was otherwise an unobjectionable man, and I can see no reason to doubt that he formed and gave his verdict according to his oath, upon the testimony given him in Court, and not otherwise.

Before considering specially the second and third grounds of the motion, it will be necessary to state the substance of the case as it appeared before the jury.

During 1862 and 1865, and the years inclusive, the defendant became the owner of eleven shares of the Wallamet Woolen Manufacturing Company stock, at Salem, at a cost of \$350 to \$830 in coin per share, the aggregate cost being \$7,480. Early in the year 1868, he disposed of this stock to Robert Kinney, for cash, notes and property, then valued by the parties to be worth in the aggregate \$33,000 in coin; namely, cash \$10,000; about ten acres of land, with grist-mill and four-mule team and wagon, at McMinnville, valued at \$10,500; 960 acres of land, with live stock, in Chehalem Valley, valued at \$6,000; Kinney's notes, bearing interest

and secured by a deposit of two shares of the stock, for \$6,500. On July 10, 1868, the defendant sold and conveyed the McMinnville property, except the mule team, to John Saxe for \$9,500 in coin. Saxe paid \$1,000 down and gave his three notes in equal sums for the remainder of the purchase money, payable in one, two and three years, with interest at one per centum per month, and secured by mortgage upon the premises.

During the time the defendant owned these shares, the Wallamet Woolen Manufacturing Company paid no dividends, and the profits accruing on the stock were estimated and returned for taxation as undivided profits, as follows: For 1864 and 1866, by the company, at \$2,475 and \$6,238 88 respectively; and for 1865 and 1867, by the defendant, at \$4,271 96 and \$2,024 66 respectively. These profits are stated in currency, and aggregate \$14,985 50.

The statement of income for 1868 was made in currency at seventy-five cents on the dollar. Converting the first cost of the stock into currency, at this rate, gives \$9,973 33. Add to this the aggregate of undivided profits which had paid taxes, gives a sum total of \$24,958 83. Converting the cash, notes and property received by defendant from Kinney, at their estimated value, into currency at the above rate, gives \$44,000 received for the stock. The difference between this sum and the cost of the stock and the profits which had paid taxes, is \$19,041 17. This latter sum, the prosecution maintained, represented the profits which the defendant had made in 1868 by the sale of the stocks, upon which no taxes had been paid, and which he ought to have included in his return for that year.

The foregoing statements were not questioned on the trial, and I have stated them as facts established in the case. The evidence in support of them was ample and uncontradicted. The calculations were made by the District Attorney and read to the jury without question on the argument, and therefore I have adopted them without verifying them.

W. A. K. Mellen, the assistant assessor for the fourth division, including Salem, testified that the defendant, then living at Salem, on March 22, 1869, in pursuance of a notice

1870.]

Opinion of the Court—Dedy, J.

and blank from his office, appeared before him at Salem to make his statement of income for 1868. Mellen had heard of the sale of stocks to Kinney, but was not aware of the details of the transaction, nor had he any knowledge of what the stocks cost the defendant. After the defendant had made the statement of income as above set forth, Mellen called his attention to this transfer of stocks, and told him that the law required him to make out an exhibit of the facts. Defendant said that he had returned all the income that he was entitled to, and refused to make any statement of income under subdivision 13. In the course of the conversation upon this subject, which lasted about fifteen minutes, defendant admitted to Mellen that he got \$10,000 cash from Kinney, but did not inform him further as to the nature of the consideration which he received, and claimed that the transaction was a swap, and therefore no profits had arisen from it to be returned. Mellen replied, that he ought to return the shares represented by the \$10,000 cash. The defendant refused to do so, and swore to the statement as above stated, without inserting any sum as profits derived from the sale of stocks.

Afterward, Mellen gave defendant notice to appear and show cause why his statement of income should not be increased \$20,000, on account of this stock transaction. In pursuance of this notice, and between April 1 and 4, the defendant appeared before Mellen, at Salem. Mellen then told the defendant that he had increased his return so as to get from him a statement of this stock transaction, and that if defendant would give witness the figures of the purchase and sale, and that made the profits less than the increase, he would reduce it. Defendant then contended that the profits on the stock had already been returned and paid tax as undivided profits of Wallamet Woolen Manufacturing Company; and said that he could not give a statement of the facts as to the cost and sale of shares, because his memorandum book was in Portland. Mellen then told him that he could appear before Mr. Frazar, the assessor at the Portland office, and attend to the matter there.

Thomas Frazar, the assessor for the District of Oregon,

Opinion of the Court—Deady, J.

[August,

testified, that prior to April 10, 1869, defendant came to his office and said that he and Mellen had disagreed about his income return, and Mellen had sent him to witness' office to arrange the matter, and he wanted to make his return here, as he was coming here to live.

Witness asked if defendant had any statement to make up income from? Defendant said, none. Witness asked defendant for memorandum book containing cost of stock. Defendant said he had lost it. Witness said he could not make up a return without some statement, and have to estimate return and assess penalty. Defendant said he had not a scratch of pen to tell what he gave for the stock or what he sold it for.

About April 12, defendant returned and handed witness a statement in pencil writing, which was produced by the witness and read to the jury. It set forth, that defendant "sold, traded and transferred, on October 9, 1868, nine shares of Wallamet Woolen Manufacturing Company stock, the proceeds of trade used, as I remember, in payment of my liabilities in taking up a note held by Ladd & Tilton for between \$4,000 and \$5,000, including interest, and in paying for sawmill, etc., altogether amounting to, I think, \$10,000, and real estate in Yamhill county." Then follows, to the effect, that John F. Miller had offered to trade defendant Portland property for four of his shares, and the most he could get offered for the property was \$4,000. That subsequently, Miller offered to sell defendant his shares for \$2,250 per share, and defendant would have taken much less for his in cash, but could get no offer. That defendant could only approximate to cost of shares. "Eight or ten shares were offered to the company before I went to California, at \$1,000 per share, I think in the spring of 1863, and subsequently were purchased; and I had to take them, or a large portion of them, paying large interest until they were paid for. On the early purchases of the stock the rate of interest was high; I remember paying high interest on a large amount of money borrowed."

After looking at this memorandum, witness asked defendant if he expected that witness could make up a return from

1870.]

Opinion of the Court—Deady, J.

that paper? Defendant said he had nothing else. Witness then told defendant that he would assist him, and asked him to state the facts from memory.

Defendant then stated, that he and Miller and J. S. Smith had purchased stock whenever they could, to get control of the company, and paid from \$500 to \$1,250 per share. Defendant represented to witness, that while he had disposed of eleven shares to Kinney, that he considered he had only sold him nine shares, because he held the other two shares as collateral security for Kinney's note. He said these nine shares cost, in the aggregate, \$8,010, or \$890 apiece—and that he had borrowed money to purchase this stock and paid interest to the amount of \$5,000. That he sold to Kinney, for \$10,000 in cash, 960 acres of land in Yamhill county, and property in McMinnville; that the land was only worth \$2 50 per acre, or \$2,000 in round numbers; and the McMinnville property, \$5,000—thus making the cost of the nine shares, including \$5,000 interest, \$13,010, and the proceeds of their sale \$17,000—which left an apparent profit of \$3,990 in coin. This being converted into currency at the above rate, gives \$5,320. The witness made a memorandum of this statement at the time, which he produced in Court and testified from. Witness testified, that at this time he was not aware that there was a mill upon the McMinnville property, but supposed, from defendant's conversation, that it was only ten acres of land; nor was he aware, nor did the defendant inform him, that it had been sold the July previous to Saxe for \$9,500, as above stated.

Witness then stated that he would take occasion to ascertain about the matter, and the defendant went away. Afterward, witness having ascertained that there was a mill on the McMinnville property, and also the sale of it to Saxe, and that defendant had received other property for his stocks which he had not mentioned to him, caused assistant Mellen, on May 7, to issue and serve a notice on defendant, to appear at witness' office on May 24, and show cause why the penalties prescribed by law should not be assessed against him, for making a false and incorrect return of his gains and income for 1868.

On the same day the defendant came into the office and said: "What's the matter?" Witness said that defendant's statements were not satisfactory. Defendant said that he had made all the statements he could make. Witness then asked defendant if he was willing to make an amended return upon the basis of the statement and figures that he had given witness at last interview? Defendant said he was. Witness then took a blank and filled it up with the same sums as the first one made before Mellen, except that under subdivision 13 he inserted as profits on sales of stocks the sum of \$5,320. The defendant then signed the return and swore to it; after which he said: "I suppose I may have my first return now." To which witness answered, "No—that's a record of the office." Witness then said to defendant: "What am I to think of a man who, while an officer was assisting him to make his return, would make such a false statement to him as defendant did to witness a few days before? That defendant had estimated the value of the McMinnville property to witness at \$5,000, when he had sold it months before at \$9,500." To this, defendant made no particular reply, but left the office. Witness also stated, that in one of the conversations, and he thinks the first one, defendant claimed that the disposition of the stock was not a sale, but a trade. On the cross-examination, witness stated that he did not inform defendant at the last interview what he had learned of the sale of the McMinnville property; and that he did not do so, because he wanted to see if the defendant would swear to what he knew to be false; and also, that he had not said to Mellen that he would get defendant to sign the second return, and then prosecute him; but that he was very indignant at the time, and probably said defendant ought to be prosecuted.

Joseph S. Watt testified that he knew the 960-acre farm in Yamhill County, that defendant received from Kinney; that about two years ago, some time in 1868, the defendant wanted to sell it to him, and asked \$10 per acre for it, and that at that time and since it was worth in cash \$7 per acre.

William S. Ladd, called by the defendant, testified that on June 13, 1868, the defendant paid him a note of \$4,000,

1870.]

Opinion of the Court—Dedy, J.

with \$104 interest upon it, and that the defendant did not pay him any other interest during that year.

John H. Hayden, called by the defendant, testified that on March 28, 1868, the defendant became an equal partner in a certain sawmill and business in this city with himself and Carter, and that the net profits of the mill for the year were \$10,000 in coin, of which the defendant received about \$2,500. This sum converted into currency at the above rate gives \$3,333.

John F. Miller, called by the defendant, testified that in June, 1868, he offered seventeen shares of Wallamet Woolen Manufacturing Company stock to defendant for \$2,250 in cash per share; that he was not able to state that there was any change in the value of shares between January and June, 1868, and that he thought the shares were worth more in 1867 than at any other time.

The newly-discovered evidence upon which the defendant asks for a new trial is set forth in the affidavit of the defendant, and the accompanying ones of S. A. Clarke, A. J. McEwan and J. S. Smith. By the affidavit of Clarke, it appears that on May 5, 1868, he was editor of the *Daily Record*, published in the town of Salem, and that on that day he published a paragraph concerning this sale of stock, to the effect that he had learned that the defendant had sold to Kinney eleven shares of Wallamet Woolen Manufacturing Company stock, and also six other shares to other members of the company, and that he had not got the exact terms of sale, but learned from Kinney that he had paid a little less than \$3,000 per share, and that he remembered it once sold at one tenth the price it now goes. Clarke adds, that when he asked defendant about terms of sale, he confirmed what Kinney had said, and assented to the publication of the particulars by not objecting when informed of his intention to do so.

By the affidavit of A. J. McEwan, it appears that on March 4, 1869, he was clerk in the sawmill of Hayden, Smith & Co., at Portland,, and that on that day he wrote to defendant at Salem as follows: "Sir—The net profits of sales made from October 1, 1868, to February 27, 1869,

\$2,149.79. Business improves rapidly since March 1." The letter accompanies the affidavit, and the affidavit states that "it was intended by me at the time to contain a true statement of the net profits of the business of the firm" for the time specified.

The affidavit of the defendant states, that until after May 7, 1869, he believed that Saxe was not personally bound to pay the notes given by him for the McMinnville property, and that he could only look to the property for payment, and that he did not believe that the property "was available" for the security of more than \$5,000 or \$6,000, and and that he knew no better until informed by J. S. Smith, after May 7, aforesaid, that Saxe was personally liable upon the notes.

The affidavit of J. S. Smith states, that he is an attorney and brother of the defendant, and that shortly after his return from Washington, in July, 1869, defendant expressed great anxiety for fear he would have to take back the McMinnville property at a loss, and evidently labored under the impression that the only security he had for the payment of the purchase money was the property itself, and feared that Saxe, after keeping it a year or two, would return it in such a condition that he could not realize the purchase money from it. That affiant then assured defendant that Saxe was liable, as well as the property, for the money; and from the surprise and gratification then manifested by defendant, he is well satisfied that up to that time defendant had been laboring under the impression that the property was all the security he had, and that he could not realize the balance of the purchase money from it.

Defendant, in his affidavit, states, that he was not aware of the materiality of any of these facts until since the trial, when he communicated them to his counsel for the first time.

To be entitled to a new trial on the ground of newly-discovered evidence, the party must satisfy the Court that the evidence has come to his knowledge since the trial—that *he has discovered it*. (G. & W. on New Trials, 1021.) Now, it is manifest and practically admitted that these facts were

1870.]

Opinion of the Court—Deady, J.

within the knowledge of the defendant before the first trial—in fact, ever since they occurred. It matters not that the defendant did not communicate them to his counsel, because they must have been discovered since the trial by the party, and not his counsel. (Id. 1093.) If this were otherwise, a party might always secure to himself a new trial by withholding from his counsel some material fact until after a verdict had gone against him. Applications for new trials upon the ground of newly-discovered evidence are liable to great abuse, and are therefore regarded with jealousy and construed with great strictness. (Id. 1021.) Indeed, I cannot but express my surprise that counsel could consent to maintain before a Court that this was newly-discovered evidence.

Again, if the evidence were newly discovered, the Court must be satisfied, before granting a new trial, *that it is so material that it would probably produce a different verdict if the new trial were granted.* (Id. 1021.) Now, none of this evidence bears directly upon the main question tried by the jury—the willful falsity of the oath of March 22—upon the point, whether the defendant made any profits, or not, in 1868, from the sales of stock, whenever purchased. The evidence of Clarke upon this question amounts to nothing. If anything, it proves, that on May 7, 1868, both the defendant and Kinney admitted that there was a sale of eleven shares of this stock for nearly \$3,000 per share, although on the trial there was a weak attempt to prove that it was an exchange of stock and property at fictitious values. The paragraph from the *Daily Record* discloses no details of the stock transactions of the defendant except the sale of eleven shares at \$3,000 per share. Now, Mellen testified on both trials, that he had heard of the sale. But when defendant said it was a swap, he wanted to know the details as to what property he got for the stock, and more than all, *what he gave for it.* It cannot be pretended that there is any information in the paragraph upon these subjects, and these are the details that Mellen professed to be ignorant of, and tried in vain to get the defendant to inform him concerning. Indeed, on the principal point—the cost of the stock—the

Opinion of the Court—Deady, J.

[August,

defendant professed to be ignorant himself. And again, if Mellen knew all about the purchase and sale of the stock, I am at a loss to conceive how that excuses or justifies the defendant for committing a mistake or falsehood in stating his income.

Before noticing specially the evidence of McEwan, it must be stated, that Mellen testified that defendant, after returning or stating the items of salary, rent and undivided profits, proposed to return a gross sum under subdivision 14, of either \$1,700 or \$1,170, and that he objected, and said it must be "itemized," whereupon defendant said it was for interest received and the profits of a sawmill in Portland. Mellen then took a piece of paper down that had been sent him from the Portland office, showing the profits of that mill—the mill of Hayden, Smith & Co.—when defendant substituted that statement for his, and entered it in subdivision 1. It is probable that defendant had the letter from McEwan in his hand at the time. On the first trial, Mellen swore that defendant took a paper from his pocket on which he thought he had amount of profits of Portland mill. On the second trial, his attention was not called to it, and he omitted to mention it. The defense, with the consent of the prosecution, examined Hayden as above stated, to show the true profits of the mill, and that the defendant had returned more under that head than he was entitled to, and therefore it was not likely that he intended to defraud the Government in the matter of the sale of the stock. But it appearing from the testimony of Mr. Hayden that the defendant's share of the profits of the mill was \$3,333, in currency, a sum larger by nearly fifty per cent. than the largest sum which the defendant proposed to return as profits from mill and interest both—that is, \$1,700 coin, or \$2,226 currency, counsel for the prosecution argued to the jury, that upon the testimony introduced by the defendant, it appeared that he had attempted to return his mill profits much below the true figure, and therefore it was not unlikely that he would attempt to defraud the Government out of the tax upon the profits on sale of stock. The evidence of McEwan is intended to show that the defendant, in offering to return

1870.]

Opinion of the Court—Deady, J.

\$1,700 for mill profits, was acting upon information derived from the clerk, and therefore, that although the information proved incorrect, the defendant was not intending to make an incorrect return in this respect.

This letter gives the profits of the mill for the last three months of the year for which defendant was making return, and the next two months of the following. The fact can hardly be overlooked by the Court, on a motion for a new trial, that this is the season of the year when sales of lumber are smallest and monthly profits least. How did McEwan come to write this letter? At the request of the defendant most likely. Why did the defendant seek this partial and incomplete information, upon which to make his return of profits; or, if he came by it casually and for another purpose, why didn't he write to his clerk and get a complete statement of the profits for the nine months of the year during which he was a partner, and for which he was making a return? Men have no more right to guess under oath, when making a statement of income, than on the witness stand in Court.

I see no reason to believe that if this letter had been before the jury, that it would have benefited the defendant. The facts contained in it, and the circumstances surrounding it, are ambiguous and as easily resolved against the defendant as for him. At that rate, his share of the profits for nine months was only \$1,189 79, when in fact they were \$2,500; and this fact had been ascertained and declared in the partnership, and Mr. Hayden had made his return for his portion accordingly to the Portland office. Is it likely that a jury would believe that a man of defendant's shrewdness and concern for his own affairs, was unaware of the real profits of the mill for 1868 at the time he made his return to Mellen? I think not. It must be admitted that the circumstance of the gross discrepancy between the sum proposed to be returned by defendant as mill profits, and interest and the true amount of mill profits, as shown by Mr. Hayden's testimony, may have had some weight with the jury, and helped their minds to the conclusion that the defendant was capable of deceit, and dis-

Opinion of the Court—Deady, J.

[August.]

posed to act disingenuously throughout the transaction. But it does not lie in the mouth of the defendant to complain of this result. The question at issue was the truth of the return as to the profits on the sale of stock, and not as to the mill profits. But the defendant thinking to get some advantage before the jury, offered the testimony of Mr. Hayden upon the latter point. The prosecution consented to its introduction, and if the result has been to the prejudice rather than the benefit of the defendant, he must submit to it.

As to the evidence of Mr. Smith; what the defendant said the McMinnville property was worth, was not the question before the jury, but what did he realize from it? Yet, the defendant having deliberately stated to Mr. Frazar in May, 1869, that it was only worth \$5,000, and at the same time having sworn to a statement of income based upon the same value, when the fact was, he had sold the property, without the four-mule team, ten months before, for \$9,500, the impression made upon the jury by these facts must have been against the defendant's veracity and the integrity of his intention. Would Mr. Smith's testimony probably change that impression upon another trial? He may be well satisfied, as he says, that his brother was honestly of the opinion that this property was not worth more than \$5,000, and that he had no security for the remainder of the purchase money except the property, and therefore his notes were of no greater value than that sum. But to say the least of it, it is a very improbable story, and one that it cannot be presumed would outweigh in the minds of an intelligent jury the well established facts to the contrary.

It seems very strange that any man in this country, of common sense and the most limited experience and observation, should not have known that the maker of a promissory note is personally liable for its payment, although it may be also secured by mortgage; particularly, when it is remembered that the statute of the State expressly provides that the maker of such note shall be so liable in case the proceeds of the mortgaged property is not sufficient to discharge the debt. (Or. Code, 251-2-3.)

1870.]

Opinion of the Court—Dedy, J.

As to the value of the property, it is not pretended that any person can be found who will swear that it was worth materially less than the defendant sold it to Saxe for. Nothing of the kind was offered on the trial. The value of the property now and at the time the oath was taken is a subject upon which there is abundant testimony in the neighborhood of McMinnville. If the defendant had any good reason for believing or asserting that the property was only worth \$5,000, other persons would have substantially coincided in that opinion and supported it by their testimony, if called upon. Mr. Saxe was upon the witness-stand and appeared to be a sensible, shrewd man. It is not likely that he would purchase a piece of property not worth more than \$5,000 for \$9,500, and pay \$1,000 of that sum down. In corroboration of this opinion it may be observed he appears to have prospered by the purchase. He paid the first note when it became due on July 10, 1869, before the first trial, and probably before the conversation between Mr. Smith and defendant, in which the latter is alleged to have expressed his fears that the property was not sufficient security for the money due, and that he was afraid he would have to take it back. It is also fair to presume that the second note was paid before the second trial. Mr. Saxe did not so state, but he was not asked the question. The defendant knew whether he had or not, and if he had not, would have shown it. Indeed, taking everything into consideration, there is not a single reason to believe, or even suppose, that this property was not ample security for the sum of Saxe's notes—\$8,500—when the defendant made this oath and since.

Although, as has been shown, the Court is not authorized to grant a new trial on account of this evidence because it is not newly discovered, but was known to the party before the trial, yet if this were otherwise, this examination of it shows that it is not a sufficient ground for a new trial, because it does not appear *to be so material that it would probably produce a different verdict if the new trial were granted.* Indeed, I think that the impression of the defendant was almost, if not altogether, correct, that these matters were

not material, and therefore he did not communicate them to to his counsel before trial.

Before proceeding to consider whether the evidence is sufficient to justify the verdict, it will be proper to state the substance of the charge to the jury upon the questions of law involved in the verdict. The Court instructed the jury in substance and effect:

I. That the acts and amendments thereto upon the subject of assessing and taxing incomes, namely, the act of August 5, 1861; July 1, 1862; June 30, 1864; March 3, 1865 and March 2, 1867, were acts *in pari materia*, or upon the same matter, and to be considered as one continuing and continuous act, and that therefore the defendant was bound to state and return for taxation as income all gains and profits derived from the sale of stocks in 1868, whenever purchased, so that they were purchased since August 5, 1861; and that by the terms of said acts and amendments thereto, a tax was imposed upon all gains, profits or income derived from any source whatever, unless specially excepted, and that therefore all gains and profits derived from the sale of stocks was taxable as income, whether such gains and profits were specially mentioned therein as being subject to taxation or not.

II. That the jury were first to inquire whether the affidavit of March 22, 1869, was false or not in the particular alleged; that is, had the defendant derived any gains or profits from the sale of stocks in 1868, which were taxable as income. That a mere exchange of property, as of the Wallamet Woolen Manufacturing Company stock for land or other property, was not a sale of stocks, from which profits were derived to be returned for taxation as income; because, although it might appear that one party or the other had gained by the exchange, that is, got property of greater value than what he gave cost him, yet this apparent gain might turn out otherwise, and is not realized until the property obtained is converted into cash or its equivalent.

That these remarks must be understood as applying only to the case of an actual exchange of property in good faith. But where the parties to a transaction which is in fact a

1870.]

Opinion of the Court—Deady, J.

sale, attempt to clothe it with the forms and give it the appearance of an exchange, for the purpose of avoiding the payment of taxes on the profits derived therefrom by either party, the jury would be authorized to look through this disguise and deal with the matter according to the fact.

That the estimated profits on the defendant's stocks for the years 1864-5-6-7, upon which the defendant, or the Wallamet Woolen Manufacturing Company for him, had paid income tax as undivided profits, was not liable to taxation again upon the sale of the stocks, and therefore the defendant was not bound to state the amount of such estimated profits in his return for 1860. But a transfer of stock, for which the seller takes a promissory note, is to be considered a sale for cash, provided the note is good and collectable, and an exchange of stocks for land, followed by a sale of the land within the year for cash or good and collectable notes, is to be considered as a sale of stocks for so much cash.

III. Apply these rules to this transaction. For instance: It appears that the defendant received from Kinney, for eleven shares of stock, property, notes and cash, valued by the parties at \$33,000 in coin. Deduct from this, \$6,000 for the 960-acre farm, which was only an exchange of property, and also \$1,000 for the difference between the exchange price of the McMinnville property and what it was sold for to Saxe, which will leave \$26,000. This property being sold within the year for cash and notes, was a sale, so far as the cash is concerned, and the notes also, if you are satisfied, from the evidence, that they were good and collectable, and the defendant had good reason to believe so when he made his return. The same remark is applicable to the note of Kinney for \$6,500. Assuming that these notes were good and collectable, the defendant received for his stock in cash \$11,000 and its equivalent, in interest-bearing promissory notes, \$15,000, in all \$26,000. Convert this into currency at seventy-five cents on the dollar, gives \$34,666. Deduct from this \$24,958, the original cost of the stock and profits which have paid taxes as undivided profits, and the remainder, \$9,708, is the least sum which the defendant was bound to have returned for taxation as profits derived from

the sale of stocks within the year 1868, and not having returned any sum, his oath was false. On the other hand, if you should find that those notes were not good and collectable, or any portion of them equal to \$9,708 in currency, then the defendant made no profits from the sale of stocks, and therefore his oath was not false.

IV. If you find that the oath of the defendant was false, the next and most serious question for you to determine is, whether it was knowingly, willfully and corruptly so. If the oath was intentionally taken by the defendant, knowing it to be false, or having no reason to believe it to be true, and for the purpose of gaining some advantage to himself, or defrauding or injuring any other, then he committed the crime of perjury.

This is peculiarly a question for the jury to decide. In passing upon it, you should carefully consider the whole conduct of the defendant and the officers before whom the proceedings took place in which the oath was taken, and the attendant circumstances as they appear to you from the testimony. If the defendant, as a matter of law, honestly believed that he was not bound to return any profits from the sale of stocks for taxation, then, although he was mistaken and the oath be false, he did not commit the crime of perjury. In other words, a party cannot be convicted of perjury when the falsity of the oath is not attributable to a corrupt intention, but to an error of judgment or a mistake as the law or facts. Therefore, if it appears probable from the testimony that the defendant took this oath, honestly believing that the law did not require him to return any profits on the transaction in question, you should find him not guilty.

But if you should be satisfied that the defendant had no reason to believe that the law did not require him to return this sale of stocks for taxation, and that his refusal to do so for the reasons then given to the assessors was a mere quibble and pretense to avoid the payment of taxes which he justly owed the government under which he has lived and prospered, your conclusion should be otherwise.

Counsel for the defendant have taken occasion to speak

1870.]

Opinion of the Court—Deady, J.

before you of the law assessing and taxing incomes as an unjust, harsh and inquisitorial one. It is hardly necessary for me to remark that such assertions or considerations are not to influence your action one way or the other. Courts and juries are organized and maintained to administer and enforce laws, and not to question or pass upon the policy or propriety of them. The whole people of the United States, by their representatives in Congress assembled, have determined that the law taxing incomes is needful and proper for the purpose of raising revenue. There being no question as to the constitutionality of the law, it must be enforced until the law-making power determines otherwise. Besides, in my judgment, there is no tax imposed in the United States which is generally more just and expedient than the one upon incomes. It is a tax not upon unproductive property or a venture or business which may yet prove profitless, but upon actual gains—upon prosperity—upon realized wealth. True, it is inquisitorial to some extent; but so are all laws providing for the collection of revenue. No tax can be fairly and intelligently imposed in any community without special inquiry in the affairs or condition of the party to be taxed. The State law imposing direct taxes requires the individual to make a sworn statement in writing of all the articles of property of which he is possessed, subject to taxation, including money, notes, etc. The law requiring deeds and mortgages to be registered exposes the private transactions of the parties thereto to the knowledge of the public; and upon its first introduction in England, was seriously objected to on that ground.

Again, if the incidental effect of the income act is, to give to each man some general knowledge of the pecuniary affairs of his neighbor, what harm is there in it? No honest man can be prejudiced in any community by a truthful statement of his income; and if dishonest ones or shams are thereby prevented from shirking their just share of the public burdens or imposing upon the community, so much the better. The only plausible objection that I ever heard to the law, is that it has not been generally enforced. That objection can be made to all laws imposing taxes; but if juries do

their duty, this one will not be more liable to it than others.

Upon the first trial I was not satisfied whether an exchange of stocks for property should be held to be a sale or not, and therefore did not pass upon the question in my charge to the jury, but instructed them as upon the second trial, that however the law should be construed upon that subject, if the defendant took the oath honestly believing that the law did not require him to return the sale, he could not be convicted of perjury on that account.

The sufficiency of the evidence to justify the verdict will next be considered. In the motion it is stated that the evidence is insufficient to justify the verdict because it “did not show that the oath was false; or if false, that it was knowingly or corruptly taken.” The *falsity* of the oath is a plain question of fact. It seems to me that there can be no two opinions about it, and that it was false beyond a doubt or peradventure. Notwithstanding this, the defendant may have taken the oath innocently and without committing the crime of perjury. That depends upon whether it was knowingly and corruptly taken. This is a question of intention, and belongs almost exclusively to the jury to determine. Its determination involves the questions of what facts and circumstances were proven in the case, and what were left doubtful, the credibility of the witnesses and the weight to be given to their testimony and the inferences to be drawn from particular facts, acts and omissions. A Court is not justified in setting aside any verdict unless it be clearly against the weight of evidence, and upon such a question as this, it must be manifest from all the evidence that the verdict is not right, before it ought to be set aside. (G. & W. on New Trials, 1239.) It is not necessary in passing upon this motion to express an absolute opinion upon the question of the defendant’s intention in this matter. Suffice it to say upon this point that in my judgment the weight of evidence is with the verdict.

The conduct of the defendant in the transaction, in most particulars of importance, was disingenuous and does not indicate integrity of purpose. For instance: If he had

1870.]

Opinion of the Court—Deady, J.

honestly thought for any reason that he was not bound to return this sale of stocks in his statement of income, how easily and natural it would have been for him, when asked about it by the assessor, to have candidly stated all the facts and given the reason for his opinion, and adhered to it until he learned better. Instead of this, he refused to disclose almost everything about the transaction. He asserted, and continued to assert, that he did not know what his stock cost—a matter which it was his business to know, and which the prosecution had no difficulty in proving; and finally, when he gave Mr. Frazar the cost, as the testimony shows, he stated it far above the fact. At first, he gave as a reason for not stating the matter in his income return, that it was a “swap” or trade. At the next interview with Mellen, nothing is said about its being a “swap,” but he asserted that the gains, if any, had already paid tax as undivided profits—an assertion which, as the testimony shows, was materially untrue. When driven by the fear of penalties and increased income to submit to make a statement of the transaction to Mr. Frazar, he deliberately asserted that the 960-acre farm was only worth \$2.50 per acre, when it was valued in his trade with Kinney at \$6,000; and when he had asked Mr. Watt \$10 per acre for it, and when it appears from the uncontradicted and every way credible testimony of Mr. Watt, that in 1868, and since, the property was worth at least \$7.00 per acre, or \$6,720; also that the McMinnville property was worth only \$5,000, not disclosing the fact that there was a valuable grist-mill upon the land, situated in one of the best and most convenient wheat regions in the country, and directly concealing the fact that in his trade with Kinney it and the mule team were valued at \$10,500, and that he had sold it without the team ten months before to Saxe for \$9,500—\$1,000 of which was paid down; and last, but not least, to save the payment of penalties, without any apparent change of opinion in the premises, he consented to, and did, make oath to the second return of May 7, which was not only itself false as to the profits on the sale of stocks, but in direct contradiction of the oath to his first return upon this point.

There is nothing of importance in the evidence to counteract the force of these and other like circumstances which tend to show that the defendant was not very scrupulous about the truth, and that he intended to obtain some advantage to himself by avoiding the payment of taxes due the government. The weight of the evidence is with the verdict, it was technically sufficient, and as the Court cannot say that it was wrong, it must not be set aside upon this ground.

In support of the fourth ground for new trial, the motion states:

1. That the law did not require the defendant to take the alleged oath, and that it was extra-judicial.

This point was not raised on the trial, nor argued on the hearing of the motion, and I suppose counsel do not rely upon it. The answer to it is apparent. It is true that the law did not compel the defendant to take this oath. He might have allowed the assessor to make up his income from other information; but it permits the defendant to take the oath and be a witness in his own favor in the matter of ascertaining the amount of his income; but if he voluntarily avails himself of this privilege, he is bound to tell the truth—and the law declares that if he knowingly and willfully swears falsely, he shall be deemed guilty of perjury. (13 Stat. 239.)

2. That the law did not require the defendant to return any income on account of the alleged sale of stocks.

The questions made under this head were not argued by counsel for the motion, and I suppose were passed upon by the Court in the progress of the trial and the instructions to the jury. In the argument of the motion, I understood the learned counsel to say that he regarded the instructions to the jury as correct, kind and considerate. On the trial the Court ruled, as in the charge to the jury, that the acts relating to income must be considered as one act, and also that the annual gains upon the sale of stocks meant all gains realized in a given year, although they have been accumulating by the increase in the value of the stocks for many years—at least since 1861, while counsel for de-

1870.]

Opinion of the Court—Dedy, J.

fendant maintained that the annual gains meant only the appreciation or increase in value for the year in which the sale occurred, and for which the income was returned. These and the foregoing are the principal rulings and instructions which may be said to constitute the law of the verdict, and I have heard nothing to make me doubt their correctness. All those which might be said to affect what is sometimes called “the justice of the case” were in favor of the defendant.

3. That it appeared from the testimony that the alleged offense was a mere misconstruction of the law.

Whether it was a mere mistake or misconstruction of the law is a question of fact, and not of law. The Court submitted the question to the jury, and instructed them that if they found the oath was false, but that the falsity was attributable to a mistake of law or fact and not to a corrupt intention, they should acquit the defendant. The jury having found the defendant guilty, by their verdict, in effect say that the testimony satisfied them that the offense was willful and corrupt perjury, and not a mere misconstruction of the law.

The fifth and last ground of the motion is the allegation of being taken by surprise in the testimony of Mellen, that he did not on March 22, 1869, know the details of the transfer of stocks by defendant to Kinney.

Courts interfere with verdicts upon this ground with great reluctance. If the surprise was owing to the least want of diligence, the applicant will be without sufficient excuse, and his motion will be denied; and it has been held that a party moving for a new trial on the ground of surprise, must show that the contrary would be proved on another trial. (G. & W. on New Trials, 876, 963, 969.)

Now, nearly a year elapsed between the first and second trials of the defendant, and the testimony of Mellen upon this point was substantially the same each time, so there could have been no surprise on this head at the second trial; and if the defendant was able to prove the contrary, it was his own fault that he did not do so at that time. Besides, it is difficult to perceive how the proof of Mellen's knowl-

edge of these details would aid the defense. It is the defendant who is supposed to have concealed the facts of the transaction, and not Mellen. Again, the details that Mellen said he was ignorant of, and which he tried to obtain from the defendant, were principally the cost of these shares and what property or consideration the defendant got for them from Kinney. Now, the affidavit of Clarke does not disclose that any of these details were ever published in the *Record*; besides, there is no evidence that Mellen ever saw the *Record*, or read the paragraph.

The motion must be denied. In coming to this conclusion, I have not overlooked the fact that the defendant is a man of means and position in this community, and that he has been able to bring to his aid to assist him in his defense all that these advantages will command, including able and experienced counsel; that nearly a year elapsed between the first and second trial, which enabled the defendant to know and prepare to meet not only the accusation against him, but the particular testimony in support of it. It is not likely that any new fact that is material would be established on a third trial, or that another jury would come to a different conclusion from the last one upon the same testimony.

The district attorney then moved for judgment. The Court pronounced sentence upon the defendant as follows:

SENTENCE OF THE DEFENDANT.

William K. Smith: You have been accused by the Grand Jury of this district of the crime of perjury, and after a fair and impartial trial, in which you had every facility to prepare your defense, and every assistance that could be rendered you by learned and able counsel, you have been found guilty by the trial jury. The question of your intention in taking what appears to have been a false oath, belonged to them to determine. Their verdict against you, although it is possible it may be incorrect, establishes your guilt before the law, and makes it the duty of this Court to ascertain and impose upon you the punishment which your crime deserves "according to the aggravation of the offense."

1870.]

Opinion of the Court—Deady, J.

The act of Congress declares that upon conviction of perjury, the person convicted shall “be punished by fine not exceeding \$2,000, and by imprisonment and confinement at hard labor not exceeding five years, according to the aggravation of the offense.”

It will be seen in the matter of punishment that much is left to the discretion of the court; and this is so, because of the great difference in the circumstances and ultimate end under and for which perjury is and may be committed. The person who as a witness maliciously swears falsely, with the intention of convicting another of a capital offense, is the worst and most dangerous species of a murderer. Between this and the case of one who swears falsely to save or gain a few dollars in a legal controversy, so far at least as the welfare of society is concerned, there is a wide difference. Yours is a case, where so far as the Court can know, the motive was to avoid the payment of \$400 or \$500 taxes to the national government. The lax state of morals in this and other American communities, which excuses, if not encourages, persons to avoid the payment of taxes justly due the National, State and municipal governments, by the use of means which would be considered dishonest between man and man, may have had much to do with the commission of this crime by you. For these reasons, and particularly on account of the recommendation of the jury, I shall make your punishment lighter than I otherwise would.

I sentence you to pay a fine of \$1,000, and to be imprisoned in the county jail of Multnomah county for the term of one day; and it is also ordered and adjudged that the United States have judgment for such fine, and costs taxed at \$500, and that you stand committed to the jail aforesaid one day for every \$2 of such fine and costs, or until the same are paid.

E. M. ADAMS v. GEORGE T. MEYERS, *Assignee of*
E. T. Warren.

DISTRICT COURT, DISTRICT OF OREGON,
SEPTEMBER 5, 1870.

1. **BANKRUPTCY.—TORTIOUS ACTS OF ASSIGNEE.**—The estate of a bankrupt is not answerable for the tortious acts of the assignee.
2. **GOODS OF TWO PARTIES MIXED BY MUTUAL CONSENT.**—When the wheat of two parties is intermixed and confused, by mutual consent they become owners in common of the grain so mixed in proportion to their respective shares of the bulk or quantity.
3. **IDEM.—BY ONE WITHOUT CONSENT OF THE OTHER.**—When the goods of two parties are mixed by one without the consent of the other, if they be grain or other articles, of equal value, the other party is only entitled to his proportionate share of the common quantity.

Before DEADY, J.

John Catlin, for defendant.

DEADY, J. This is a controversy submitted to the Court upon an agreed case pursuant to chapter 2, title XIV, of the Code. (Or. Code, 202.)

From the case stated it appears:

I. That on March 10, 1870, said Warren filed his petition in bankruptcy in this Court, and that on March 14 he was duly adjudged a bankrupt, and that afterwards the defendant was appointed assignee of said bankrupt. That in September, 1869, the plaintiff delivered to said Warren 221 bushels of merchantable wheat, for which the latter gave his receipt as follows:

“McMinnville, Or., Sept. 22, 1869. Commercial Mills.
Received of E. M. Adams 13,260 lbs. wheat, equal to 221
bushels. (Signed.) E. T. WARREN, FRANK.”

That said Warren received said wheat as a warehouseman and put it in a granary then owned by him and situate near his grist mill aforesaid, and with the knowledge and consent of the plaintiff intermixed and confused the same with a large quantity of other wheat, not the property of the plaintiff, and that prior to said March 10, said Warren al-

1870.]

Opinion of the Court—Deady, J.

lowed all the wheat to be removed from said granary, but that none of said wheat was ever returned to plaintiff, nor did he ever receive any satisfaction therefor, except for $11\frac{4.8}{100}$ bushels.

II. That the defendant, as assignee aforesaid, became possessed of several hundred bushels of wheat stored in bulk in another granary near the mill aforesaid, which, on May 3, he sold at public auction, the plaintiff then and there protesting against the sale of so much of said wheat as would be equal in quantity to the number of bushels stored by him with Warren as aforesaid, and that at the time of said sale said wheat was worth sixty cents per bushel in coin.

Upon this statement of facts, which is to be deemed a special verdict (Or. Code, 203), the plaintiff claims that the defendant is liable to him in the sum of \$126.12 damages for the conversion of the wheat delivered as aforesaid, and not returned or accounted for. On the other hand the defendant denies that he is liable to the plaintiff in any sum.

The case was submitted without argument, and I am not therefore specially advised as to the particular questions of law which the parties to the controversy deem involved in it and necessary to its determination. It is also understood from a remark of counsel for the defendant, that there are other controversies existing between the defendant and other persons growing out of the deposit of wheat with Warren under similar circumstances, and that this is intended or expected to be a test case. For these reasons I will consider whatever questions of law that appear to arise upon the facts.

And first, as to the character in which the defendant is liable, if at all. In the title of the case stated, he is described as assignee of Warren, from which it may be implied that the plaintiff seeks to charge him in his character or relation of assignee, and not personally or absolutely. But the defendant is not liable to be sued as assignee until the supposed creditor has proved his debt, and that proof has been rejected by the District Judge. (B. Act, sec. 24.) In the latter case the creditor may bring an action against

the assignee as such in the Circuit Court to establish his claim, but in either event the creditor only receives his *pro rata* of the bankrupt's estate.

Besides, the facts stated show that the defendant, if liable to the plaintiff at all, is liable personally, and not as assignee. The gravamen of the complaint is, that the defendant sold and disposed of wheat in the north granary which the plaintiff claimed to be in some sort his property, and thereby wrongfully converted the same to his own use, to the damage of the plaintiff the sum claimed. The estate of the bankrupt is not answerable for the tortious acts of the defendant because he is the assignee thereof, or professed to be acting as assignee in the matter complained of.

The law arising upon the facts stated concerning the deposit of wheat is well settled. The plaintiff's wheat having been mixed and confused with that in Warren's possession, with the mutual consent of the parties, the plaintiff became tenant in common with Warren of the bulk of grain produced by the mixture, and his interest therein was in proportion to the number of bushels deposited by him. Practically the result would be the same in this case if the wheat had been mixed without the plaintiff's consent, because, being presumed to be of equal value, the plaintiff would not be injured if he received the number of bushels of wheat deposited by him, although not the specific grains so deposited. (*Willard v. Rice et al.*, 11 Met. 495; 2 Black. Com. 405; 2 Kent Com. 364; *Hart v. TenEyck*, 2 John. Ch. 108; Story Bail. § 40.)

But it appears that Warren removed, or allowed to be removed, all the grain in this granary before the filing of the petition in bankruptcy. Particularly what became of it does not appear. Probably it was manufactured into flour and disposed of by Warren long before the filing of the petition. But the inquiry is not material, so long as there is no evidence to show that it is the identical grain sold by the defendant contrary to the protest of the plaintiff. Upon this point the case stated is silent and no inference in favor of the plaintiff can be made from the facts set forth. This being so, the plaintiff, so far as appears, had no interest in

the specific grain disposed of by the defendant. His only interest was that of a general creditor of the estate. It must be presumed from the facts stated that the plaintiff's grain was converted by Warren to his own use. If so he thereby became liable to the plaintiff for its value. This liability is a claim against the estate and provable as a debt in bankruptcy.

In conclusion, it is sufficient to say, that the defendant did not personally incur any liability to the plaintiff by the sale of the wheat in question, because the plaintiff does not appear to have had any specific interest or property in it. The claim of the plaintiff is for damages in money for the value of wheat deposited with the bankrupt, and by him converted to his own use and not accounted for. Such a claim is a debt or demand provable against the bankrupt's estate, and for which the assignee, as such, cannot be sued, except the same be rejected by the District Judge, on objections by the assignee, as prescribed in section 23 of the Bankrupt Act.

Let judgment be entered, that the plaintiff take nothing upon the case stated and that the defendant recover his costs, and expenses to be taxed.

PHILIP G. GALPIN v. LUCY B. PAGE.

CIRCUIT COURT, DISTRICT OF CALIFORNIA,
SEPTEMBER 13, 1870.

1. JUDGMENT SALE VALID, THOUGH JUDGMENT REVERSED.—A sale of lands regularly made under a judgment of a Court of record, valid upon its face, is valid; and a subsequent reversal of the judgment, on appeal, will not defeat the title acquired by a stranger through such sale.
2. JURISDICTION SUPERIOR COURTS PRESUMED.—On a collateral attack upon a judgment of a Superior Court, the Court will be conclusively presumed to have acquired jurisdiction, unless the record, on its face, affirmatively shows a want of jurisdiction.
3. RECORD SILENT; JURISDICTION PRESUMED.—If the record of a Superior Court is silent as to the proof of a jurisdictional fact, on a collateral attack, due proof of the fact will be presumed in support of the judgment.

Statement of the Case.

[Sept.]

4. **RECITAL CONCLUSIVE.**—The recital of a jurisdictional fact, there being nothing to the contrary in the record, is conclusive evidence, in a collateral proceeding, of the determination of the fact upon sufficient evidence, although the evidence does not appear in the record.
5. **SERVICE BY PUBLICATION.**—Where the statute authorizes service of a summons issued by a Court of record, to be made with respect to a specific subject matter, by publication, the Court issuing the summons has jurisdiction to determine the fact, whether the service has been properly made; and the determination is conclusive, when collaterally brought into question.
6. **CONSOLIDATED ACTIONS; JURISDICTION.**—Where two actions are consolidated, in one of which the Court has jurisdiction of all the parties, and the action in which the Court has acquired jurisdiction, requires precisely the same decree and sale as is entered in the consolidated action; the decree and sale thereunder will be valid, as a decree and sale in the action in which the Court has acquired jurisdiction, although the Court failed to acquire jurisdiction in the other action.
7. **EXECUTION BEFORE JUDGMENT ROLL MADE UP.**—Under the Practice Act of the State of California, an execution may be issued and executed as soon as the judgment is entered, and before the judgment roll is actually made up.
8. **DECREE IN ABSENCE OF INDISPENSABLE PARTIES.**—When a Court proceeds to a decree, in the absence of an indispensable party, without objection from any source, and the decree is not reversed or set aside, and a sale of real estate is had under the decree, whether said decree and sale is valid as to the parties before the Court, discussed, but not decided.

Before SAWYER, Circuit Judge.

Ejectment.—A jury having been waived, the cause was tried by the Court. The following facts necessary to understand the points decided, are condensed from the findings filed by the Court:

Franklin C. Gray died intestate in the city of New York, July 15, 1853, seized of the lands in question, leaving a widow, Matilda C. Gray, who, subsequently, gave birth to a female child, Franklina C. Gray, the lawful issue of said Franklin. The said Matilda C. and Franklina C. Gray, under the statutes of California, were the heirs at law of the said Franklin, and, as such, succeeded by inheritance to the interest of said decedent in said premises. The said Matilda C., and Franklina C. Gray have always been citizens and residents of the State of New York, having never been in the State of California.

On February 15, 1854, William H. Gray commenced a

1870.]

Statement of the Case.

suit in the Fourth District Court for the State of California, by filing therein a complaint against Cornelius J. Eaton and Joseph C. Palmer, as administrators of said Franklin C. Gray, deceased, and the said Eaton, individually, as claiming some interest in his own right in the estate of said deceased, and said Matilda C., widow, and James Gray, father of said Franklin, as his heirs at law, in which complaint he alleged a partnership between himself and the said Franklin, during the life time, and at the time of the decease of the latter, the former having one third, and the latter two thirds interest therein; that said partnership embraced all transactions of said Franklin, both commercial and in real estate; that the business was carried on in the name of said Franklin alone, and all property, real and personal, was bought and sold in his name, but that all property, real and personal, a schedule of which is annexed to the complaint, including the *locus in quo* standing in the name of said Franklin, at the time of his decease, was partnership property, and held in trust for said firm. He prayed that the property might be adjudged to be partnership property; that an account might be taken, the affairs of the firm settled up, and that one third of the proceeds of the partnership property be adjudged to him, and the whole partitioned between the said William H. Gray, and the defendants, according to their respective interests.

On June 27, 1854, said William H. Gray, complainant, filed a supplemental complaint, in which he alleges the birth of the said Franklina C. since the commencement of the action; that she is entitled to share in the estate as heir at law; and that she resides with her mother at Brooklyn, N. Y. He prays that she be made a party, that a guardian *ad litem* be appointed, that service by publication of summons may be had in pursuance of the statute of the State of California, upon said Matilda C. and Franklina C., and for the same relief prayed in the original complaint.

An order for publication was made, as to both mother and child, and that a copy of the summons and complaint be sent through the Post Office addressed to said infant, care of her mother at Brooklyn, N. Y.

The publication was made, and the copy of complaint and summons sent to said defendants Matilda C. and infant, Franklina C. as prescribed by the statute, and said order of the Court. October 9, 1854, said defendant, Matilda C., by her attorney, Henry S. Foote, appeared, and filed her answer in said cause. December 16, 1854, complainant, William H. Gray, filed his petition, stating the infancy and non-residence of said Franklina C., that due service of summons had been made by publication, and asking the appointment of a guardian *ad litem* in pursuance of the statute on the subject.

On the same day the Court regularly appointed said Henry S. Foote, the attorney of defendant, Matilda C., as guardian *ad litem* of said infant defendant, Franklina C. The said H. S. Foote, as guardian *ad litem*, of said infant, filed January 2, 1855, an answer on her behalf, denying all the allegations of the complaint. The said administrators, Eaton and Palmer, having been duly served, also appeared, and filed their answers as such administrators, denying the allegations of the complaint. The said Cornelius J. Eaton, also, on his own behalf, answered, denying the allegations of the complaint, and denying that the schedule annexed was a true statement of the property. He then, as new matter, entitling him, in his individual character to affirmative relief, alleged on his own behalf, that he was a partner with the said Franklin C. Gray in his life time, and, at the time of his decease, and that all the property was partnership property; that since the decease of said Franklin, he had been in possession of the same, both as surviving partner and as administrator; and that he had other demands against said Franklin. He annexes a schedule of the partnership property, also, including the *locus in quo*, and prays that he may be adjudged a partner, that an account be had, the partnership affairs settled, and a partition made.

The issues of fact on plaintiff's complaint in this action, were tried on the days from the sixteenth to the twentieth of January, 1855, inclusive, the said infant defendant appearing by her said guardian *ad litem*, H. S. Foote, and all other defendants by their counsel, and a general and special

1870.]

Statement of the Case.

verdict on the issues was returned in favor of complainant, William H. Gray.

A motion for new trial was made and denied, and, an appeal from the order denying the motion having been taken to the Supreme Court, the appeal was dismissed October 1, 1855. No judgment was entered on said verdict till after the following proceedings were had.

April 14, 1855, the said Cornelius J. Eaton commenced a suit in his own behalf in the same Court, against said Joseph C. Palmer, as administrator, and said Matilda C. and Franklina C. Gray, as heirs at law of said Franklin C. Gray, by filing a complaint in which he alleged a partnership, etc., substantially the same as in his individual answer, setting up an affirmative cause of action, filed in the said suit of *William H. Gray v. Eaton et al.*, before mentioned.

He sets up a claim to one fourth interest as partner with said Franklin C., in all the property held by said Gray at the time of his decease, annexing a schedule thereof including said premises. He alleges the heirship of said Matilda C. and Franklina C.; the infancy of the latter, and prays that a guardian *ad litem* may be appointed for her; that he be adjudged a partner; that an account and settlement of the partnership affairs may be had, and the assets partitioned, etc. He afterward amended the complaint, making said William H. Gray a party defendant, alleging that he claims some interest in the partnership property.

April 16, 1855, a summons was duly issued in said cause. Afterward an affidavit of the book-keeper in the office of the San Francisco Herald was filed, showing a publication of summons for three months in the said San Francisco Herald, but there are not now found in the record, or on the files, of this action, any affidavit for an order of publication of summons, nor any order for service by publication, or any affidavit showing a deposit in the Post Office of any copy of the summons and complaint addressed to said Franklina C. or her mother, the said Matilda C. Gray, at their place of abode.

Upon filing the said affidavit of publication of summons in the Herald, September 3, 1855, said complainant filed a

petition praying the appointment of said Henry S. Foote as guardian *ad litem*, and a consent of said Foote to act. The petition states the proper facts, and among others, "that the service of summons in the said action upon the said infant defendant has been completed upwards of ten days," and, thereupon, on the same day, the court made an order with the proper recitals, appointing said Foote guardian *ad litem* for said infant, and in said order, it is among other things recited, that it appears to the court "that the service of the summons in said action upon her (said Franklina C. Gray) has been completed upwards of ten days." Conceding the service of summons to have been properly made, this order was regularly made.

September 15, 1855, said Foote, as guardian *ad litem* of said infant, filed an answer, denying all the allegations of the complaint.

The said defendant, Matilda C. Gray, mother of said infant, also, by her attorney, the said Henry S. Foote, appeared and filed her answer, also denying the allegations of the complaint. The said Palmer, administrator, and said William H Gray, also, filed similar answers.

On October 23, 1855, all the said parties in the said two actions, other than said infant, by their attorneys of record, and the said infant by the said Foote, as guardian *ad litem*, filed a stipulation in writing, duly signed by said attorneys and guardian *ad litem*, to consolidate said two actions into one. On October 27, 1855, the Court made, signed, and filed in said consolidated actions, a judgment or decree, in which it was adjudged that said Franklin C. Gray, deceased, and Cornelius J. Eaton, were partners in business from January 1, 1851, till the decease of said Franklin in 1853, and that said partnership embraced all the property, real and personal, of said parties; and each of them, the said Franklin C. having three fourths, and said Cornelius J. Eaton one fourth interest therein, and adjudging to said Eaton one fourth interest; also, adjudging that there was a like partnership existing between the said Franklin C. and William H. Gray, but that said last partnership was subject and subordinate to said partnership between said Eaton

and said Franklin C. Gray; that is to say, that said Franklin C. and William H. Gray were partners in the three fourths interest in the said partnership of said Franklin C. Gray and Cornelius J. Eaton, held in the name of said Franklin C., the said William H. Gray holding one third and the said Franklin C. two-thirds of said three fourths interest in said partnership between said Eaton and Gray, and adjudging such interest to said William H. Gray; also, adjudging that said Matilda C. and Franklina C. Gray were each entitled to one half the interest which said Franklin C. would have if living.

The judgment or decree ordered an account to be taken and stated, and appointed a commissioner to state the accounts of the said partners and to make sales of the property, real and personal, in pursuance of the directions of the judgment, or of any further judgment or order that might be made by the Court.

On March 25, 1856, the commissioner made a report, stating the several accounts and showing the partnership property on hand, real and personal, which included the premises in question.

April 7, 1856, the Court entered an order confirming said report, and directing a further judgment or decree to be entered in pursuance therewith. On the same day the Court made, signed and filed in said consolidated action a further and final judgment or decree in pursuance of said order, in which, among other things, the commissioner before appointed was directed to proceed and sell said partnership property, in pursuance of the directions in the said prior judgment, receive the proceeds, and pay over portions of the proceeds and divide the remainder in a specified manner.

The said judgment so signed and filed was regularly entered in the judgment book of said Court as required by the statute.

Afterward, May 3, 1856, the said commissioner in pursuance of the direction of said two judgments or decrees, after duly advertising the sale, sold the said real property, as directed by said two judgments, or decrees, including the premises in question. The commissioner having reported

the said sale, the same was confirmed by the Court, May 14, 1856. The premises in question were sold at their full value, and conveyed by said commissioner to Gwyn Page, and the title thus acquired has become vested in the defendant, Lucy B. Page.

At the time of said sale, the said commissioner, for the purposes of said sale had in his possession the said original final judgment made and filed April 7, 1856, also, a certified copy thereof. He inadvertently failed to return said original to the files of the court, but retained it in his possession for nine years thereafter, when it was found and returned to the files, but the judgment had been duly entered, and was of record in the judgment book, as required by statute. The clerk neglected to attach together the proper papers and make up the judgment roll in said consolidated action as prescribed by the statute, till November 24, 1856, long after said sale, and at the time of making up said roll at said last named date, the said original judgment, made and filed on the said seventh of April, 1856, was in the possession of said commissioner, and not in the custody of said clerk, and, was, consequently, not attached to said roll.

No other evidence of a due service, or want of service of summons on said infant defendant in said case of *Eaton v. Palmer et al.*, is now found in the record, or the files of the case, than is herein-before, and in the opinion of the Court, stated.

Subsequent to said sale and conveyance, an appeal to the Supreme Court of California from said decrees in said consolidated actions of *Gray v. Eaton & Palmer, administrators et al.*, and *Eaton v. Palmer, administrator et al.*, was taken by said defendants, *Matilda C.*, and *Franklina C. Gray*, and upon said appeal, at the April term, 1858, the judgment, or decree in said cause of *Eaton v. Palmer, et al.*, was reversed, so far as it affected the rights of said infant defendant, *Franklina C. Gray*, on the ground that there had been no sufficient service of summons, but not reversed, as to the other parties, and as to the other action of *Gray v. Eaton, Palmer et al.*, the judgment was reversed, as to both the defendants *Matilda C.* and *Franklina C. Gray*, on the ground of insuffi-

1870.]

Statement of the Case.

ciency of evidence to justify it, and the cause remanded for further proceedings.

The statute in force at the time when the actions were commenced, and the decree or judgment rendered, by virtue of which the premises were sold, provided for service on non-resident defendants as follows, to wit.:

“When the person on whom the service is to be made, resides out of the State, * * * * * and the fact shall appear by affidavit, to the satisfaction of the Court, or a judge thereof, or a county judge, and it shall, in like manner, appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such Court or judge may grant an order that the service be made by the publication of the summons.

“The order shall direct the publication to be made in a newspaper, to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least, once a week; *provided*, that publication against a defendant residing out of the State, * * * shall not be less than three months. In case of publication where the residence of a non-resident * * * is known, the Court or judge shall, also, direct a copy of the summons and complaint to be forthwith deposited in the post-office directed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint, out of the State, shall be equivalent to publication and deposit in the post-office.

“In either case, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication.

“Proof of the service of the summons shall be as follows. In case of publication the affidavit of the printer or his foreman, or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post-office, if the same shall have been deposited”.

The plaintiff has acquired such title as *Matilda C.* and *Franklina C. Gray* had to the premises in controversy, after the sale and conveyance made under said judgment, and

the defendant has the title derived under said sale. The other facts necessary to comprehend the points decided are stated in the opinion.

J. B. Harmon, for plaintiff.

Williams & Thornton, for defendant.

SAWYER, Circuit Judge: If the decree, or *judgment* as the statute of California terms it, in the consolidated actions of *Gray v. Eaton, Palmer et al.*, was upon its face a valid decree or judgment, and if it authorized the sale under which defendant claims, at the time it was made, the sale is valid, and it passed the title; and the subsequent reversal of the decree by the Supreme Court of California on appeal, did not invalidate the title thus acquired, while the decree was in force. This is settled by the case of *Gray v. Brignardello* (1 Wallace 633-37) in which this identical sale was under consideration. The question, then, is, was there a valid decree, or judgment, authorizing the sale in force at the time the said sale was made?

By some oversight, in the case of *Gray v. Brignardello*, only the interlocutory decree of the 27th of October, 1855, was introduced in evidence, and the Supreme Court, finding only this decree in the record, necessarily assumed that there was no other, and held that this decree, being interlocutory, only, did not authorize a sale. The sale was held to be void on the ground that there had been no final decree entered authorizing it. In the present case, as shown by the findings, it appears, that the commissioner on the twenty-fifth of March, 1856, made his report, as required by the said interlocutory decree of October 27, 1855; that his report was duly confirmed, and a final decree in accordance therewith directed by order of the Court, on the seventh of April, 1856, and on the same day, in pursuance of such order, a final decree was drawn up, signed by the Judge, filed in the case, and afterward duly entered in the Judgment Book; and that the commissioner had the original decree so signed and filed, in his possession for the purposes of the sale, at the time of making said sale. The said decree of the seventh

1870.]

Opinion of the Court—Sawyer, J.

of April, 1856, in terms empowers the commissioner to sell. If these several decrees were valid, at the time of the sale, the sale under them is valid, and the title to the property has passed to the defendant, Lucy B. Page. Although the same title is in question, the ground upon which *Gray v. Brignardello* was reversed, is obviated in this case, by the introduction of the decree therein omitted, and the decision must depend upon other points not determined in that case. The question now is, whether it appears upon the face of the record, that the Court had no jurisdiction to make a decree that should be binding upon all, or any, of the defendants, for, as expressed in a very old case, "the rule of jurisdiction, is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which especially appears to be so." (*Peacock v. Bell*, 1 Saund. 74.) The record in the consolidated action is here attacked collaterally, and, not on appeal, or in a direct proceeding of any kind to reverse, set aside, or vacate the decree. The rule is different in the two cases. When attacked collaterally, it is not enough, that the record does not affirmatively show jurisdiction, but on the contrary, it must affirmatively show that the Court did not have jurisdiction, or the decree will be valid until reversed on appeal, or vacated in some direct proceeding taken for that purpose. (*Hahn v. Kelly* 34 Cal. 391; *Grignon's Lessees v. Astor et al.*, 2 How. U. S. 319, 340-1, 343; *Voorhees v. Bank U. S.*, 10 Pet. 449, 471-3, 475; *Sargent et al. v. State Bank of Indiana*, 12 How. 384-5-6; *Huff v. Hutchinson*, 14 How. 588; *Ex Parte Watkins*, 3 Pet. 193; *Town of Huntington v. Town of Charlotte*, 15 Vt. 46; *Foote v. Stevens*, 17 Wend. 483; *Granger v. Clark*, 22 Me. 128.) If the decree under which the sale in question was made is void, it is on the ground that it appears on the face of the record, that there was no service, in any mode recognized by the statute, upon the infant defendant, Franklina C. Gray, who was, at the time, a resident of the State of New York, and the Court failed to acquire jurisdiction of her person. Since the trial of other cases in this Court involving titles derived under the same sale, the subject of the validity of judgments obtained upon publication of sum-

mons on a collateral attack, has undergone, in the case of *Hahn v. Kelly* (34 Cal. 391), a more thorough investigation in the Supreme Court of the State of California than it had ever before received in that Court. After an elaborate discussion of the whole question, prior decisions, upon some points, were somewhat modified, and the law upon the subject, so far as this State is concerned, was finally settled. This decision has been repeatedly affirmed by subsequent decisions, both before and since the change in the constitution of the Court, and as it settles the law of California upon the subject, I regard it as binding upon this Court, which, in the present action, is only administering the laws of the State of California.* Besides, I am satisfied that the decision rests upon sound and well established legal principles, often recognized by adjudications of the Supreme Court of the United States. Under the decision in *Hahn v. Kelly*, I have no doubt, that, upon the face of the record in the consolidated actions of *Gray v. Palmer, Eaton, et al.*, and *Eaton v. Palmer et al.*, when presented in a collateral proceeding, the Court must be held to have acquired jurisdiction of the person of Franklina C. Gray, for the purposes of determining her rights in the subject matter of those actions. In the former case, there is no room for doubt. Besides, in that very case, on appeal from the decree now under consideration, the very question was directly presented to the appellate Court, whether there was a valid service on said infant, under the laws of California; and it was held on said appeal to be a valid service, but the decree was reversed on other grounds. (*Gray v. Palmer, Eaton et al.*, 9 Cal. 616, 637.) Thus, the question whether there was a valid service, under the statutes of California, was directly determined in the affirmative by the highest Court in the State on appeal, wherein the question was directly made and decided. But it was held on the same appeal, that there was no sufficient service on the said infant, Franklina C. Gray. in the other

* "This construction of a State law upon a question affecting the title to real property in the State by its highest Court, is binding upon the federal Court," (*Williams v. Kirtland*, 13 Wall. 311, decided since the decision of this case)

1870.]

Opinion of the Court—Sawyer, J.

case of *Eaton v. Palmer*, and the decree as to that case was for this error reversed only “so far as it affects the rights of the infant, Franklina C. Gray,” and was not disturbed as to any of the other defendants. (*Id.*, 641.) But this was after the sale in question, and the question on appeal is a very different one from the question presented when the judgment is attacked collaterally, as is the case now in hand; and it does not follow that the decree was not valid at the time of the sale, as to the infant, on a collateral attack, because it was afterward reversed on appeal on the ground stated. At the time of the sale, a purchaser was entitled to rely on the validity of the decree, unless it affirmatively appeared on the face of the record that the Court had no jurisdiction of the infant. Does a want of jurisdiction so appear? I think not. Certainly not under the principles established by the Supreme Court of California in the case of *Hahn v. Kelly* (*supra*), and subsequent cases affirming it.

The provisions of the statute in force, at the time of the pendency of the action respecting service on non-resident defendants, who were necessary parties to actions, and respecting judgments, and judgment rolls affecting the question, are found in the Finding of Facts, and need not be repeated here. The statute, it will be perceived, does not provide what shall be done with the orders of publication, or the affidavits upon which they are based. They do not constitute any part of the judgment roll, as was held in *Hahn v. Kelly* (34 Cal. 404, 429.) We can only look to the judgment roll in a collateral attack, for that, and that only, is the record. (*Id.* 404, 425, 429.) Upon the same point, the Supreme Court of California, in *Sharp v. Daugney*, 33 Cal. 512–13, says:

“The order of publication, and the affidavit on which the order was based, were also in evidence, but as neither the one nor the other constituted any part of the proof of service, they were both foreign to the record, by which, in a collateral attack upon the judgment, we can only be advised concerning the jurisdiction of the Court to pronounce it. The circumstance that papers not belonging to the judgment roll are found commingled with it, or attached to other papers that do belong to it, can create no embarrass-

ment. The case is one of mixture and not of fusion, and the papers not falling within the statute definition of a 'judgment roll,' must be treated as of no effect."

The record imports absolute verity, and cannot be impeached from without. (See 34 Cal. 422, *et seq.*) The statute in force when the judgment or decree in question was rendered, provided: Firstly, That the judgment should be entered in the judgment book. Secondly, That "immediately after entering the judgment, the clerk should attach together and file the following papers, which shall constitute the judgment roll: 1st. In case the complaint be not answered by any defendant, the summons, with the affidavit or *proof* of service, and the complaint, with a memorandum endorsed on the complaint that default of defendant in not answering was entered, and a copy of the judgment. 2d. In all other cases, the summons, pleadings and a copy of the judgment, and any orders relating to a change of parties.

Taking the view most favorable to plaintiff, and regarding the judgment in question as one by default, although there was a guardian appointed and an answer filed, and examining the papers which constitute the judgment roll, or the record, and we find an affidavit of the printer showing publication of summons. This is all we would expect to find in that affidavit. The printer's affidavit never covers any fact other than the publication of summons. That branch of the proof is fully covered. The affidavit of deposit of a copy of the complaint and summons in the post-office, or of the statutory substitute, personal service of a copy at the residence of defendant abroad, covers a separate and independent fact, and is always made by a different party. In this case, no affidavit now appears on the record as to deposit in the post-office, or personal service abroad as a substitute. The record, therefore, is simply silent on the subject. It does not affirmatively appear by the record, or by evidence on file, or otherwise, what was done, or that anything was done upon this point; nor does it appear that nothing was done. The record is simply silent. Nor does it appear by the record that the residence of the infant was known to the plaintiff, unless it can be inferred from

1870.]

Opinion of the Court—Sawyer, J.

the fact that because the plaintiff in the other case of *Gray v. Palmer* was aware of her residence, that Eaton must, also, have been aware of it. But, in a collateral attack upon the judgment, we are not authorized to arrive at conclusions in this mode, although this is the way the Supreme Court of California seems to have arrived at its conclusions on appeal. It does not appear, therefore, that it was a case requiring a deposit, or if it does, it does not affirmatively appear that the deposit in the post-office was not made. The record is simply silent on the subject. It neither appears in the judgment roll nor record, nor even in the files or minutes of the Court, so far as they have been presented in this case, whether there was a deposit in the post-office; or a personal service abroad, as a substitute, or not. There is simply nothing on the subject, except what is shown by the findings. It is notorious that at that time papers were carelessly kept, and much negligence prevailed in making up judgment rolls. In this very case, the papers were not attached together and filed as a judgment roll, until November 24, 1856,—long after the time prescribed by the statute, and of the sale; and, even then, a copy of the final judgment was omitted from the roll, although the judgment itself had been duly entered in the judgment book. At that time, and for a long time afterward, the original draft of the judgment signed by the judge, and filed in the case, was in the hands of the commissioner, and, doubtless (though it does not so affirmatively appear), for the purpose of the reference, all the papers were, from time to time, also in the hands of the commissioner. Ample opportunity for loss was afforded, and no little neglect occurred. Some of the papers may have been lost during that time, and for that reason may have been omitted. If so, the rights of parties purchasing cannot be affected by the carelessness of the clerk in performing the manual duty of keeping and attaching together the proper papers designated by the statute as constituting the judgment roll. (*Lick v. Stockdale*, 18 Cal. 223; *Sharp v. Lumley*, 34 Cal. 614.) In this case, during the long delay in attaching together the papers to form a judgment roll, some were mislaid, and others may well have

been lost. But however this may be, the Court is a superior Court, and under the authorities cited, when the records of such Court is silent, all intendments are in favor of the judgment. In such cases, that is to say, when the record is silent, it certainly does not show affirmatively a want of jurisdiction. Looking to the judgment roll alone, in this case, a want of jurisdiction is not disclosed by the record. The most that can possibly be said is that it does not affirmatively show a service on the infant in any mode recognized by law; but, as we have seen, this is insufficient to invalidate a judgment on a collateral attack.

If it is admissible to go outside of the judgment roll to the files and minutes of the Court for the purpose of impeaching the record—but it is not—(*Hahn v. Kelly, supra*) we find nothing more in this case of an affirmative character tending to impeach the judgment. We simply find the same absence of the material facts, that is found in the roll or record. But, upon looking at the order appointing a guardian *ad litem* in the case of *Eaton v. Palmer et al.*, in which the defective service exists, if anywhere, we find a recital in the order, that, “it appearing to the satisfaction of the Court, from the said petition and consent (consent to act as guardian), and the other papers and certificates on file in said action, that the said infant defendant, Franklina C. Gray, is under the age of fourteen years; that she is a necessary party to the complete determination of the controversy in the said action; and that the service of the summons in the said action upon her has been completed upwards of ten days, it is, on motion of Glassell and Leigh, attorneys for the said plaintiff, ordered that Henry S. Foote be, and he is hereby appointed guardian *ad litem*,” etc., etc. This is an express adjudication that there was a service, and the Court, certainly, had jurisdiction to determine this question. The evidence upon which it acted may have been subsequently lost. The record certainly contains nothing to contradict it. And this adjudication is of itself sufficient to sustain the judgment when collaterally attacked, if we can look outside the judgment roll at all. (*Sargent v. State Bank of Indiana*, 12 How. 384–5; *Grignon’s Lessees v. Astor et al.*,

1870.]

Opinion of the Court—Sawyer, J.

2 How. 340-1, 319; *Voorhees v. Bank of United States*, 10 Peter, 472-3; *Erwin v. Lewis*, 7 How. 181; *Landes v. Brant*, 10 How. 370-1; *Lick v. Stockdale*, 18 Cal. 223; *Hahn v. Kelly*, *supra*.) In *Erwin v. Lewis*, the Court say, "We hold that wherever a judgment is given by a Court having jurisdiction of the parties and of the subject matter, the exercise of jurisdiction warrants the presumption, in favor of the purchaser, that the facts which were necessary to be proved to confer jurisdiction were proved." (7 How. 181.) In *Sargent v. State Bank of Indiana* (*supra* 384) the recital was, "It appearing to the Court now here, that proper legal notices having been given of the motion, it is by the Court ordered," etc.; and the Court say (p. 385), "the real, veritable record informs us that legal and sufficient notice was given to the heirs of Samuel Sargent, but whether by this paper [a paper found among the files,] or in what other mode (except that it was legal and sufficient), we are not told, and are not at liberty in this case to indulge in inferences against the verity of the record. It is a principle well settled, too, in judicial proceedings, that whatever may be the power of a superior Court in the exercise of regular appellate jurisdiction, to examine the acts of an inferior Court, the proceedings of a Court of general and competent jurisdiction cannot be properly impeached and re-examined collaterally by a distinct tribunal, one not acting in the exercise of appellate power. To permit the converse of this principle in practice, would unsettle nine tenths of the rights and titles in any community, and lead to infinite confusion and wrong." The syllabus in *Grignon's Lessees v. Astor et al.*, is: "It was for the Court to decide upon the existence of the facts, which gave jurisdiction; and the exercise of jurisdiction warrants the presumption, that the facts which were necessary to be proved, were proved" (2 How. 319). And the Court say: "The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they exist or not, is wholly immaterial, if no appeal is taken; the rule is the same, whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns." (*Id.* 340).

In *Voorhees v. Bank of the United States*, land of a non-resident debtor was sold under a proceeding in attachment. It was “contended by counsel for plaintiff in error, that all the requisitions of the law are conditions precedent; which must not only be performed before the power of the Court to order a sale, or the auditors to execute it can arise, but that strict performance must appear on record.” (10 Pet. 471.) But the Court say on this point, “The process which they adopted was the same as prescribed by the law; they ordered a sale, which was executed, and on the return thereof, gave it their confirmation. This was the judgment of a Court of competent jurisdiction on all the acts preceding the sale, affirming their validity in the same manner as their judgment had affirmed the existence of a debt. There is no principle of law better settled than that every act of a Court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears; this rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record; which henceforth proves itself, without referring to the evidence on which it has been adjudged.

“In this case the Court issued an order of sale, agreeably to law, which having been returned by the auditors, and ‘being inspected, the Court grant judgment of confirmation thereon.’ It is, therefore, a direct adjudication that the order of sale was executed according to law. They had undoubted authority to render such a judgment; and there is nothing on the record to show that it was not rightfully exercised. If the defendants’ objections can be sustained, it will be on the ground that this judgment was false; and that the order of sale was not executed according to law, because the evidence of its execution was not of record. The same reason would equally apply to the non-residence of the defendant within the State, the existence of a debt due the plaintiff, or any other creditor, which is the basis on which the whole proceeding rests. The auditors are equally silent on the evidence upon which they reported that debts were

1870.]

Opinion of the Court—Sawyer, J.

due by the defendant, as on the evidence and notice of due publication; but no one could pretend that the judgment that the debts reported were due, shall be presumed to be false. Though the able and ingenious argument of the defendant has not been directed at this part of the judgment of the Court of Common Pleas, the grounds of objection are broad enough to embrace it; for, in resting their case on the only position which the record leaves them, they necessarily affirm the general proposition that a sale by order of a Court of competent jurisdiction, may be declared a nullity in a collateral action, if their record does not show affirmatively the evidence of a compliance with the terms prescribed by law in making such sale. We cannot hesitate in giving a distinct and unqualified negative to this proposition, both on principle and authority too well and long settled to be questioned." (10 Pet. 472.)

And in *Lick v. Stockdale* (18 Cal. 223), the recital of service was held conclusive, even when the question was presented on appeal from the judgment. The Court say:

"Several assignments of error are made:

"1st. That the judgment roll does not show that the Court ever acquired jurisdiction over the person of Stockdale, one of the defendants; but the finding of the Court is that the defendant was duly served with process, and this recital is sufficient to show that the Court had jurisdiction. The judgment does not depend upon the performance of the clerical duty of making up the judgment roll, or the preserving of the papers. It is enough if the facts exist which are required to give jurisdiction to the Court; and the finding in this case is that they do exist, though the summons and returns—the usual evidence—may have been lost or mislaid."

In *Hart v. Seixas* (21 Wend, 40), the Court went still further, probably too far, when the case is on appeal. So in the case in hand, the appointment of a guardian *ad litem*, the recital of the service of process in the order (or whether recited or not), the subsequent proceeding ordering a sale, confirmation of sale, etc., are as much an adjudication that the proper proceedings had been taken, as the several pro-

Opinion of the Court—Sawyer, J.

[Sept.]

ceedings referred to were adjudications upon a similar point in the cases cited, and in several of those cases the defendants were non-residents. And there is nothing in the record, or even in the files, or other evidence introduced, outside the technical record, inconsistent with the adjudication. There is simply a failure to state in the record, as it now exists, what the evidence as to one particular upon the question of due service was, and under the authorities cited, and especially in the case of *Hahn v. Kelley*, the presumption that the Court had the necessary evidence and properly adjudicated the question, must prevail in this collateral attack.

It has been earnestly urged that this presumption in favor of the record does not prevail when it appears that the party to be served resides out of the State, and beyond the territorial jurisdiction of the Court; that it only applies when the party resides, or is presumed to reside, within the territorial jurisdiction of the Court; that when the record shows, as in this case, that the party to be served is not within the territorial jurisdiction of the Court, the presumption is changed, and that the record must affirmatively show the performance of all acts necessary to give jurisdiction of the person in such an action, and this was once so held by this Court. But aside from that case, I do not find this position thus broadly stated sustained by the authorities, and with deference to the opinion in the case referred to, I can find no substantial ground for making this distinction. The authorities cited by plaintiff's counsel do not appear to me to sustain the position. They are cases depending upon different principles, in actions purely and strictly personal, which will be briefly alluded to in the course of this opinion, but which, it appears to me, have no application to this case, or to the class of cases to which this belongs. The presumption in favor of the validity of judgments of superior courts in cases where there is a mode provided by law for acquiring jurisdiction for the purposes of the action, are not made to rest on the fact that the parties to the proceeding reside within the territorial jurisdiction of the Court, but upon the character of

the Courts themselves, and the great principles of public policy which require that some confidence should be reposed in the proceedings of the higher judicial tribunals of the land. The law of California, as of most other States, provides means by which jurisdiction of the parties in certain cases may be acquired, both when they reside within and without the territorial jurisdiction of the Court. The means in the case of residents may be, and they usually are, different from those prescribed in cases of non-residents. But the Court can no more acquire jurisdiction of a resident without pursuing the course prescribed by law to acquire jurisdiction of such resident, than it can acquire jurisdiction of a non-resident, without pursuing the course prescribed for acquiring jurisdiction of such non-resident, and, in the latter case, it as clearly has jurisdiction to determine for itself whether it has acquired jurisdiction, as in the former. In determining that question it exercises the same kind of judicial functions as it would in determining whether it has acquired jurisdiction of a resident, and having jurisdiction to determine the question, and having determined it, in a case where the law provides for acquiring jurisdiction of a non-resident, is not the adjudication entitled to the same credit, and are not the same presumptions as to the correctness of the determination to prevail, in the one case, as in the other? Are not the same principles of public policy as applicable to one as to the other? If not, why not? It rests upon those who maintain a different doctrine to present some solid reason for making the distinction. In *Hahn v. Kelley*, 34 Cal. 426-7, one of the justices observes on this point:

“The Court exercises the same functions and the same jurisdiction in determining whether there was a service, whether personal, and the evidence is the certificate of the Sheriff, or affidavit of a party competent to serve the process, or by publication, and the evidence is by the affidavit of the printer. And I see no reason why the same presumption should not arise in one case as in the other. It is a record in either case, for the statute makes it so in one case as well as in the other. And the record must be tried by

Opinion of the Court—Sawyer, J.

[Sept.]

itself alone. There is no new jurisdiction, either as to the person or subject matter conferred on the Court by the statute authorizing service by publication of summons. The service is made in cases involving the ordinary process of the Court. Only the mode of serving process is modified in certain cases within its ordinary jurisdiction.

“In some of the States a service was formerly, and, doubtless, now is, made by leaving a copy of the summons at the residence of the defendant, with some person of suitable age and discretion, or at his last known place of residence. I am not aware that any different rule of presumptions in courts of record was applied to the record of a domestic judgment on a service of this kind, from that applied to a service upon the party himself. Yet this can no more be called a personal service than a service by publication. The only question at last is, was there a service in any legal mode? and the Court has jurisdiction to determine that question. If the Court determining the question is a Court of Record, the judgment record imports absolute verity, and whatever that says must be taken as true. If the record in fact does not speak the truth, the only remedy of the party is to attack it directly on appeal, or in the Court of which it is a record, if under the circumstances it can there be corrected, or by some direct suit or proceeding known to the law to vacate it.” (See also *Id.* 415; and *Coit v. Haven*, 30 Conn. 199; *Voorhies v. Bank U. S.*, 10 Pet. 469; *Sargeant v. State Bank of Indiana*, 12 How. 385,) which were cases of non-residents and absentees.

I will now notice some of plaintiff's authorities on the points before discussed. In the case of *D'Arcy v. Ketchum et al.*, (11 How. 166,) cited by plaintiff, the record stated affirmatively that there was no service (*Id.* 166). In *Hollingsworth v. Barbour*, (4 Pet. 466,) the party “did not claim as locator” (*Id.* 473), and the case was not within the statute authorizing a service by publication. The whole proceeding was unauthorized, as the Court was not empowered to obtain jurisdiction in the mode attempted (*Id.* 474–6). In *Boswell's Lessees v. Otis*, (9 How. 348), the Court did not have jurisdiction of the particular subject matter in contro-

1870.]

Opinion of the Court—Sawyer, J.

versy, in the mode of procedure adopted, and there was no authority under the statute to proceed against the person, or against the land without a service on the person. The case of *Harris v. Hardeman et al.*, (14 How. 334,) was not a case of collateral attack. The Court below upon a direct attack while the proceedings were still, “as it were, *in fieri*,” by motion as a substitute for a writ of error *coram vobis* or *audita querela*, had set the judgment aside (*Id.* 345–6, 337). This action was thereupon affirmed upon writ of error. Besides the record disclosed what the service was. The Court say, also, that there is “less show of objection to such action on the part of the Court, as it affects the rights of no third parties, but is limited in its consequences to the parties to the suit only.” (*Id.* 346). And even in this case, it is worthy of remark, that three of the Justices of the Supreme Court dissented. The inapplicability of the other cases cited on this point by plaintiffs, upon examination will be found to be equally obvious. They are, with but few exceptions, cases strictly personal, wherein judgments for money have been rendered against non-residents where there was no possibility of a personal service, and where, also, there was no provision of law whatever for procuring a constructive service; and the question has arisen in a subsequent suit between the same parties, upon the judgment, in the State where the defendant resides. The question is presented when the transcript of the personal judgment is offered in evidence in the foreign jurisdiction, and constitutes the very basis of a new action. In such cases it has been held that the judgment may be attacked collaterally on the ground of want of jurisdiction of the person, and this, even when the record affirmatively shows a personal service in due form—that the fact of service may be inquired into without regard to what appears in the record. In short, no force at all is given to the record on the question of jurisdiction beyond mere *prima facie* evidence. And in that class of cases, where the courts have gone so far in disregarding the record of a foreign judgment, it is not surprising that, on the issue, as to whether jurisdiction of the person has been acquired, proof that the defendant did not reside within the

territorial jurisdiction, should be regarded as raising a presumption that there was no personal service sufficient at least to require the record to rebut it by an affirmative showing of service.

This would be but a reasonable presumption, and especially so, since the law of the State provided no mode of acquiring jurisdiction by even a constructive service. In such cases it has been held that the fact of an appearance, as well as a service, affirmatively shown by the record, may be disproved against the record. It is apparent that the ordinary rules relating to records do not apply at all to this class of cases. Those cases clearly depend upon a different principle from that involved in the case in hand, as was said in *Granger v. Clark*, 22 Me. 130; and this is the class of cases in which the presumption insisted on by the plaintiff has been indulged. The case of *Borden v. Fitch*, 15 John, is one of the exceptions. The judgment in that case was for a divorce obtained in Vermont by publication. It was held invalid in New York, for want of personal service within the territorial jurisdiction of the Court. But this decision would scarcely be regarded as law at this day.

The established doctrine now is, as I understand it, in cases of divorce, that the decree is regarded as acting upon the *status* of the parties. It is substantially treated as in the nature of a proceeding *in rem*. The *status* of the parties corresponding to the *rem* in proceedings *in rem*; and now, I believe, decrees of divorce upon service by publication against absent and non-resident parties in States where constructive service, in this mode, is authorized by statute, are, upon the principle indicated, regarded as valid in other States. If they are not, then thousands of citizens, at this day, must occupy very perilous positions. Besides, the question is a very different one, when arising between the same parties, upon the presumption of the record in evidence as the foundation for the recovery of a new judgment for the amount of money recovered by the old judgment, from that which arises when the judgment has been executed by a sale, and the question is, whether within the same territorial jurisdiction, a third party has acquired

1870.]

Opinion of the Court—Sawyer, J.

a title to land by virtue of such judgment and sale. In the first case, the question is, does the defendant in the judgment owe the money to the plaintiff? It is the old matter in litigation over again. If the demand is just, it may be established in some other mode; if unjust, a recovery certainly ought not to be had. In the other case, it is whether a stranger is entitled to consider the judgment of a superior Court to be what it appears to be? May he repose any confidence in the action of Courts? May he act on the presumption that a superior Court has discharged its duty, and properly determined the question of its own jurisdiction, or must he deal with its judgments at his peril? But when a domestic judgment, even of the class referred to, is presented between the same parties, as a basis of a recovery in another action, the record cannot be contradicted, nor can its validity be impugned, unless the want of jurisdiction affirmatively appears on the face of the record itself. (*Town of Huntington v. Town of Charlotte*, 15 Vermont, 48; *Granger v. Clark*, 22 Me. 128; *Coit v. Havens*, 30 Conn. 199; *Cook v. Darling*, 18 Pick. 393.)

It is insisted by plaintiff, that the decree in which the sale in question took place was purely against the person, and that no valid judgment against the person can, in any case, be had without personal service within the territorial jurisdiction of the Court. While I admit that the proceeding is not strictly a proceeding *in rem*, I also think it is not strictly a proceeding against the person. The subject matter of the controversy was a partnership. The object was to establish a partnership, alleged to have existed within the territorial jurisdiction of the Court, which had become dissolved by the death of one of the partners, to take an account of the partnership business, wind up and settle the affairs of the concern, and distribute among the parties interested the assets, which assets were also within the territorial jurisdiction of the Court. The non-resident defendants were not themselves partners, but only interested as heirs of the deceased partner. The property claimed to belong to the partners consisted of both personalty and realty. There was no decree asked or made against the

persons of the defendants, or affecting any property other than the alleged partnership property within the territorial jurisdiction of the Court. The proceeding is *quasi in rem*, as it only operates upon specific property, like an attachment proceeding; a proceeding to foreclose a mortgage; or to quiet title to real estate. In *Boswell's Lessees v. Otis et al.*, the Court say: "Jurisdiction is acquired in one of two ways; first, as against the person of the defendant, by the service of process; or secondly, by a procedure against the property of the defendant, within the jurisdiction of the Court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. It is immaterial whether the proceeding against the property be by an attachment, or bill in chancery. It must be substantially a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate, is not strictly a proceeding *in rem* in ordinary cases, but where such a procedure is authorized by statute on publication, without personal service of process, it is substantially of that character." (9 How. 348.)

These observations are applicable to the case in hand. It is substantially, though not strictly or technically, a proceeding *in rem*. It is one of that class of cases wherein it is necessary to acquire jurisdiction of non-resident parties interested, for the purpose of affecting the status of the parties with reference to other parties, and to specific property, and the specific property itself, in some other mode than by personal service. Unless a constructive service could be obtained valid for the purpose, it would be impossible to wind up a partnership through the medium of courts by proceedings as to some of the parties *in invitum*, when the partners reside in different States. It is one of a class of cases everywhere recognized as proper for acquiring jurisdiction by constructive service, when the laws in terms authorize it. The statute of California provided for acquiring jurisdiction by publication of summons, and, I have no doubt, that when the statutory mode is pursued in such a case, the judgment or decree of the court disposing of the property is binding, as to the property, upon the non-resi-

1870.]

Opinion of the Court—Sawyer, J.

dent parties. Jurisdiction is thus acquired for the purposes of the case in a lawful mode, although a party is absent. Whereas, in the case before referred to, of a purely personal judgment, there was no possibility of acquiring jurisdiction of the parties by any kind of service known to the law. In a collateral attack upon the judgment in such a case as that now under consideration, the question of jurisdiction must be determined upon the same principles as are applied when the question is, whether jurisdiction has been acquired of the person of a resident defendant. In the case of *Hahn v. Kelly*, so often referred to, the defendant, Jones, in the action to foreclose the mortgage, was in Washington, D. C., at the time of the service, or attempted service, by publication. That case settles the law for the State of California; and, I believe, upon solid principles. From knowledge derived from a large experience, judicial and otherwise, in the State of California, I very much doubt, whether, under any rules less favorable to the sanctity of judgments of our superior courts, when presented for review in collateral proceedings, than that established in *Hahn v. Kelly*, a judgment could be found in the State, rendered during the first ten years of its judicial history, upon service by publication, that would stand the test of judicial scrutiny. And yet, owing to the transitory character of our population, during that time, the titles to vast amounts of real estate now depend upon the validity of just such judgments. Public policy demands that some confidence should be reposed in the judgments of our highest tribunals, and titles derived through sales sanctioned by judicial decrees, should not, years afterward, be lightly declared invalid. To adopt a different rule in this court from that established as the law of the State, would be to make the rights of the parties depend upon the particular court administering the laws within the same territorial jurisdiction in which the action is brought, and not upon the laws of the State of California, which we, in cases of this kind, are supposed to administer. Although this court may be regarded, as in some sense, a different jurisdiction from the State courts, yet it has the same territorial jurisdiction, and administers the same gen-

eral laws as the State courts, and the judgments of the latter, in the said actions of *Gray v. Palmer* and *Eaton v. Palmer*, must be regarded in this court, for the purpose in hand, as domestic, and not foreign judgments. Since the decision in *Hahn v. Kelly*, it has not only been affirmed by the Supreme Court of the State in numerous instances, but it has also been heretofore followed in this court. (Manuscript opinion of Hoffman, J., in *Prieto v. Wells et al.*, Oct. Term, 1869.)

That the papers constituting the judgment roll under the statute were not attached together by the clerk till long after the sale, and that a copy of the final judgment or decree was then omitted by the clerk cannot affect the rights of the parties. The law required the judgment to be entered in a book to be called a judgment book, and a copy to be annexed to the judgment roll. I take it that the original judgment, so entered in the judgment book is, at least, a record of as great solemnity as the copy attached to the judgment roll. Under the statute, the judgment is in a condition to be executed as soon as entered, and before the papers are attached together to form a roll, and before docketing. So held in *Sharp v. Lumley*, 34 Cal, 614, and other subsequent cases. (See also *Gray v. Palmer et al.*, 28 Cal. 419–20.) The latter case is an appeal from the final judgment of the District Court dismissing the case involved in this controversy after the reversal of the judgment in question. But the appeal was not taken in time, and the question as to the propriety of dismissing the action could not be determined.

There is nothing in plaintiff's point that the commissioner's deed is void, because the sale is recited to have been made under the decree of Oct. 27th, 1855, when it was in fact made under the decree of April 7th, 1856. In point of fact, strictly speaking, the recital in the deed is only that "James D. Thornton was appointed commissioner to sell," etc., under said decree, and this is strictly true. It was under that decree that he was appointed commissioner to sell. By the terms of that decree, he was directed to sell in pursuance of the directions in that decree, and of such further directions as the court should give.

1870.]

Opinion of the Court—Sawyer, J.

And again in the final judgment, or decree, of April 7th, 1856, the commissioner was directed “to proceed to sell all the property, real and personal, of the said partnerships, as directed in the former decree of this court;” and it was “further ordered” in said final decree “that in all things not otherwise herein provided the said commissioner do observe and obey the former decree herein rendered;” that is to say, the decree of October 27th, 1855. The commissioner, therefore, did sell under the decree of October 27th, 1855, as well as under the decree of April 7th, 1856, for the latter decree so directed him to do, and referred to the earlier decree for specific directions. He in fact sold under both decrees, although he was “appointed” under the first. In selling under either he, also, necessarily, sold under the other. The deed does not in terms show under what he sold, but only by what he was appointed. In advertising the commissioner stated that he should sell under both decrees, expressly referring to both in terms, and the report of the sale embraced, as a part of the report, the advertisement containing said recitals of both decrees. The report, therefore, shows a sale under both decrees. The report of sale was confirmed, and the deed made in pursuance of the said sale. There is no contradiction of the recitals in the deed.

Another view, which seems to me to be entirely tenable, leads to the same result as to the title of the land in question. Conceding, for the purposes of this view, that the judgment or decree is invalid upon its face, as to the case of *Eaton v. Palmer, et al.*, I do not see why the decree and sale thereunder are not valid as a decree and sale in the case of *Gray v. Palmer, Eaton et al.* Although the two actions were consolidated for the purpose of a decree, after a trial of the main issues, in Gray’s case, the decree is by no means joint. The claims of William H. Gray and Eaton are not joint, but several and adverse, and the portions of the decrees applicable to each are severable. In the case of *Gray v. Palmer, Eaton et al.*, there can be no doubt as to jurisdiction of the infant on the face of record, and, as we have before seen, this was so held by the Supreme Court

of this State on appeal. There was, then, in that case, jurisdiction of the subject matter, and of all the parties for the purpose, of that action. Eaton was a defendant in that action, and he set up in his answer as a defense in part, against Gray's action, and as a basis for affirmative relief, the same facts which are alleged in his complaint in his own action, and it was indispensable to ascertain all the facts as to his rights, in order to determine the rights of the plaintiff Gray, and decree the relief to which he was entitled; and it is by no means clear that, under the system in force in California, Eaton was not entitled to obtain his relief in that action. But, however this may be, in that case it was found that the partnership of W. H. Gray and Franklin C. Gray, was subordinate to the partnership of Eaton and Franklin C. Gray, and it was impossible to determine the rights of the plaintiff Gray, in the action of *Gray v. Palmer, Eaton et al.*, without ascertaining all the facts, and taking the several accounts, precisely as they were ascertained and taken in the consolidated actions. It was also necessary to make the sale in order to distribute to plaintiff Gray, his share of the partnership assets in the same way it was made. So the findings, statement of the accounts and decree for a sale, are precisely as they necessarily would have been in order to afford Wm. H. Gray the relief to which he was entitled, if Eaton had never commenced the suit of *Eaton v. Palmer et al.*, or having commenced it, it never had been consolidated with the other. If there is anything wrong in the decree, the wrong does not consist in the statement of the accounts in determining the share belonging to Gray; or in ordering a sale and directing the share of Gray in the partnership assets to be paid to him; for all this would necessarily have been done in his own separate action, just exactly as it was done (the pleadings in that action required all this to be done), but it consists in erroneously distributing the balance after Gray received his share; and in this Gray had no concern whatever. He was only bound to look to his own rights, and having ascertained and secured them, he was not responsible for the disposition which the Court might make of that part of the funds which belonged to others.

1870.]

Opinion of the Court—Sawyer, J.

The facts determined then, so far as Gray is concerned, and the decree of sale are precisely such as were necessary in the action of *Gray v. Palmer, Eaton et al.*, and such as they would have been if the action of *Eaton v. Palmer* had never been connected with it. No good reason is perceived why the judgment and sale were not entirely valid as a judgment or decree and sale in that action. If the balance of the proceeds of sale, after setting apart to Gray the amount belonging to him, was improperly distributed, that was no concern of Gray's, or of the purchasers under the sale. They were not bound to look to the application of the proceeds. It is enough that the rights of Gray required just such a decree and sale, and that there was, in fact, such a decree as was necessary to afford him the proper remedy, and a regular sale in pursuance of the decree.

The decrees, in fact, were treated as several in the Supreme Court of California on appeal. In *Gray v. Palmer et al.*, the entire decree was reversed on the ground of insufficiency of evidence to sustain it; and in *Eaton v. Palmer* it was only reversed as to the infant, for error in appointing a guardian *ad litem* before a service of process, and, as we have seen, the exigencies of the case of *Gray v. Palmer et al.*, required the sale of all the property and a determination as between Gray and the other parties of all the other matters adjudged in the decree.

There was, then, a valid decree and sale in the suit of *Gray v. Palmer*. Just such a decree and sale as would have been necessary had there been no consolidation, and no such suit at all as *Eaton v. Palmer*.

Defendant's counsel, also maintain that as the Court had jurisdiction of all the parties in *Gray v. Palmer*, by the consolidation of that action by the consent of the parties to it, with the other action of *Eaton v. Palmer*, the Court acquired jurisdiction of the parties in both, and cite *Busteed v. Gates* (4 Dana 436), to sustain the proposition. They also insist, that, although an infant be not served, yet, if a guardian *ad litem* be in fact appointed, and he appears and defends the action, the judgment is erroneous only, and not void; and the cases of *Busteed v. Gates* (4 Dana, 430—

Opinion of the Court—Sawyer, J.

[Sept.]

37); *U. S. Bank v. Cockran* (9 Dana, 395), and *Benningfield v. Reed* (6 B. Mon. 106), appear to sustain this proposition, but, upon the view taken in this case, it is unnecessary to decide these points.

If wrong on the main proposition, as to the validity of the entire decree, at the time of the sale, the defendant claims, that, at worst, it was valid as to all parties except the infant, Franklina C. Gray, and that the sale passed the title to Mrs. Gray's half of, or interest in, the property; that defendant, therefore, has the title to one half the premises in controversy, and in any event the recovery must be limited to one undivided half. All the parties appeared in both actions except the infant, and there was a valid service and appointment of guardian *ad litem*, and appearance by said guardian in the case of *Gray v. Palmer*; and the other action of *Eaton v. Palmer*, in which, if in either, there was no service, the judgment was never reversed as to any of the defendants except the infant. The judgment in that case still stands as to all others. Is the judgment necessarily void as to all, because it did not affect the rights of one of the parties? Or was the judgment and sale valid as to the parties over whom the Court had jurisdiction? If the latter is the true state of the law, then the title to the interest of all the parties, except the infant, passed by the sale, leaving the rights of the infant unaffected. In that case, she became a co-owner of the property with the purchasers instead of with her mother, and such a change in no way affects her legal rights to the property. It is legally a matter of no moment to her, who her co-owners are.

Evidently the Supreme Court of California, did not regard the judgment as void, as to all the parties because it was irregular as to the infant, for if this had been its view, the judgment when found to be void as to all, because irregular as to one, would have been reversed as to all. But it was not so reversed. It was only reversed as to the infant, and it stands to-day as to all the other parties, and this action of the Court recognizes its validity. Does not this adjudication become the law of this case whatever the rule may be as to others? (*Ex parte Watkins*, 3 Pet. 206; 6 Cr. 267.)

1870.]

Opinion of the Court—Sawyer, J.

It is claimed on the part of the plaintiff, that the infant was a necessary or indispensable party to the action, and that being a necessary or indispensable party, the Court had no jurisdiction to make a decree that would affect any of the parties without first acquiring jurisdiction as to such infant. There are many cases to the effect that the Court will not proceed to a decree in the absence of a necessary party, but so far as they have been brought to my notice, the question in every case was raised somewhere in the progress of the cause, whereupon the Court declined to proceed to a decree, or upon appeal from the decree. But assuming the infant to be a necessary party, the Court in this case, did, in fact, proceed to a decree, without any objection being made for want of parties, or want of service on the infant, and the decree was finally executed by a sale. No case has been called to my attention, in which it was held, that, as to those who were parties, such a decree is void, when called in question collaterally, or, that the parties, who were before the Court, and permitted the Court, in fact, to proceed to a decree, and the decree to be executed by a sale, without objection, were not bound by the sale. The rights as between them, or their successors, and the absent parties may not have been effectually determined, but why is it not sufficient to substitute the purchasers to the rights of those who were parties? Story, in his work on "Equity Pleadings," states the rule as to when the objection for want of parties may be taken, and the consequences of not bringing the proper parties before the Court, thus:

"If the proper parties are not made, the defendant may either demur to the bill, or take the objection by way of plea or answer; or (subject to the considerations above suggested), when the cause comes on to a hearing, he may object that the proper parties are wanting; or the Court itself may state the objection, and refuse to proceed to make a decree; or, if a decree is made, it may, for this very defect, be reversed on a rehearing or on an appeal; or if it be not reversed, yet it will bind none but the parties to the suit, and those claiming under them, so that all the evils of a fruitless or inadequate litigation may sometimes be visited

Opinion of the Court—Sawyer, J.

[Sept.]

upon the successful party in the original suit, by leaving his title still open to future question and controversy." (Sec. 75.) If a decree is, in fact, made, and not reversed for want of necessary parties, there is no intimation here, that it would not be binding upon those who were parties, and suffered the decree to be made without objection. On the contrary, the inference is plainly the other way, for the learned author says, "it will bind none but the parties to the suit, and those claiming under them," and that the evils of a fruitless and inadequate litigation may be visited upon the successful party by leaving it open to future controversy. Had he supposed the parties brought in were not bound in any degree whatever, he would certainly have said so here, for the occasion called for it, whereas, what he did say, plainly indicates that he regarded the rule to be otherwise. The rule as thus stated is substantially repeated in sections 236 and 541. (See also to the same effect, 1 Dan. Ch. P. 341. *Hickok v. Scribner*, 3 John. Cas. 317, and cases cited in note 4 to section 236.)

Judge Story further observes, that, "The mere non-joinder of a proper party cannot avail the defendant in a bill of review, unless it appears to his prejudice; and there is the more reason for this rule, because the absent person is not barred by the decree, but may in another suit vindicate his rights." The case of *Whiting v. Bank of United States*, 13 Pet. 14, cited fully sustains the note. If the Court would not sustain a bill of review on the application of one of the defendants, on the ground of error in proceeding to a decree in the absence of a party, it certainly ought not to be regarded as void as to those who are parties. In the case now in hand, suppose the absent party had chosen to acquiesce in the decree as originally entered, and had never attempted, or should never attempt, to reverse it, or set up any claim against it, in what particular would Mrs. Gray, or the other parties, who claim nothing in privity with the infant, have been injured or interested? They had their day in Court, and their rights were disposed of; other parties succeeded to their interest, who thereby became jointly interested with the infant in their stead. In *Whiting v. United*

1870]

Syllabus.

States Bank, supra, the Court say: "Breckenridge, the absent party, is not barred in the original decree, because he is no party thereto, and, therefore, his interest cannot be prejudiced thereby. But if they were, he, and he alone, has a right to complain, and to seek redress from the Court; and not the plaintiffs, who are not his representatives, or intrusted with the vindication of his rights. Breckenridge has made no complaint, and sought no redress." (Id. 14.) These remarks would seem to apply as well to the position of the parties to this suit, and the infant defendant.

While I incline to the view that the sale is valid, as to all the other parties interested, even if void as to the infant, yet upon the view taken upon the main propositions involved, it is not necessary to decide the point now, and for that reason, I have not fully examined the authorities, and I do not desire to be understood as expressing a positive opinion upon it. I only allude to the point for the purpose of calling attention of plaintiff's counsel and the appellate Court more particularly to it, in case the cause should be taken to the Supreme Court for review, and my view upon the main proposition be found erroneous.

My conclusion is, that the title to the premises in controversy appears to be in the defendant, Lucy B. Page, and that she is entitled to judgment.

Let judgment be entered for defendant, with costs of suit.

In re D. GHIRARDELLI & Co. IN BANKRUPTCY.

DISTRICT COURT, DISTRICT OF CALIFORNIA,
SEPTEMBER 16, 1870.

1. BANKRUPTCY—SUIT AGAINST BANKRUPT IN STATE COURT.—On an application for leave to sue the bankrupt in a State Court, the bankrupt will not enter upon the inquiry, whether the debt be one from which the bankrupt would be relieved by his discharge; but, *semble*, that, upon a special showing that the right of the creditor might be lost if a suit were not forthwith commenced, the Court might allow the suit to be brought and prosecuted so far as might be necessary to save rights.

Before HOFFMAN, District Judge.

John B. Felton and A. D. Spivalo, attorneys for bankrupt.

Edward J. Pringle, attorney for trustee.

G. Frank Smith, attorney for creditors.

HOFFMAN, J. Certain creditors of the bankrupt, in this case, have applied to the Court for leave to prosecute suits against him for debts alleged to have been created by his defalcation, while acting in a fiduciary capacity, to wit.: as administrator of the estates of certain parties deceased.

The application is opposed by the trustee appointed by the creditors.

The twenty-first section of the Bankrupt Act provides, that "no creditor whose debt is provable under this Act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined."

The case presented is clearly within the terms of this prohibition.

It is urged, however that inasmuch as the debts in question will not be released by the discharge, there can be no reason for restraining suits to enforce them until the happening of an event which can in no way affect the creditors' rights.

But to this limitation of the general language of the twenty-first section there are grave objections.

The object of the provision was to prevent the bankrupt from being harassed during the proceedings to obtain his discharge, by suits to recover provable debts. This object would be in a great measure defeated, if, on the mere allegation that the debt was incurred by the bankrupt while acting in a fiduciary capacity, or was created by fraud, the creditor could institute and carry to final judgments suits before the ordinary tribunals.

The only ground for refusing the stay of proceedings, which the bankrupt Court is, by section twenty-first, required to grant, would be the fact that the debt is of the character mentioned in the thirty-second section.

But that fact might be disputed, and before the Court

could, a protracted and expensive investigation might be necessary. But this investigation would in no respect be a final adjudication, for if a suit in a State Court should be commenced after the discharge, to which the discharge should be pleaded as a bar, the truth of the plaintiff's replication, that the debt was excluded from the operation of the discharge would be open to inquiry and would necessarily be passed upon by the Court.

So, too, if no discharge should be granted, the investigation by this Court, into the nature and origin of the debt, would be wholly useless.

The stay authorized by the statute is but temporary. It terminates with the decision of the Court, on the question of the discharge, or sooner, if there be unreasonable delay, on the part of the bankrupt in endeavoring to obtain his discharge.

The attempt to determine in advance, what will be the effect of the discharge upon particular debts, when, as yet, it is not known whether any discharge will be granted, seems premature and unnecessary.

The creditor, the debt to whom was created by fraud, is not more inconvenienced by the temporary suspension of his right to sue, than the ordinary creditor who may know of facts which will prevent the discharge, but yet is prohibited from suing. In neither case will the proceedings in bankruptcy be a bar to a subsequent suit. But in both, the statute requires that a temporary stay of proceedings shall be granted by the Court.

The provisions of the 26th section, with regard to the arrest of the bankrupt, have no application to the subject we are considering.

That section enacts that "No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil suit, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him."

The 27th general order provides that a bankrupt so arrested may be brought before the District Court by habeas corpus, and if it be ascertained that the process on which

he is arrested has been issued for the collection of any claim provable in bankruptcy, he shall be discharged.

It would seem that this general order carries the exemption of the bankrupt from arrest further than is warranted by the statute. For the latter by plain implication allows an arrest for a debt or claim from which the bankrupt would not be released by his discharge. (*In re Galaer*, 1 B. R. 73.)

In the case of Seymour (6 Int. Rev. Rec. p. 60,) it was held by the District Judge for the Southern District of New York that the provisions of the 21st section do not extend to suits to collect debts from which the bankrupt would not be released by his discharge in bankruptcy. But in the case of Rosenberg, (2 B. R. 84,) the same learned Judge reconsidered this opinion, and held that section 21 must be construed to include all suits to recover debts provable under the Act. His reasons are substantially those given in this opinion. His large experience and the great attention he has bestowed upon the Bankrupt Act and questions arising under it, entitle his mature and well considered opinion, especially where he admits a previous error, to the greatest consideration.

But while the Act forbids the maintaining or the prosecution to final judgment of any suit for a debt provable under the Act, it does not in terms prohibit the commencement of such a suit. Whenever, therefore, it appears that the suit is one to which the discharge in bankruptcy might be no bar, and that if not commenced forthwith the statute of limitations might run against it, or that service might not be obtained upon the bankrupt, or that testimony might be lost, I am inclined to think the Court might permit the suit to be commenced for the purpose of saving the statute, effecting a service, or securing the testimony. When these objects are attained, the suit could be stayed to await the determination of the question of the debtor's discharge, or the expiration of a reasonable time therefor.

But a special showing should in such case be made, and leave to prosecute would be granted only so far as might be absolutely necessary to secure the creditor's rights.

No such showing has been made in this case, and I am, therefore, of opinion that the application should be denied.

1870.]

Opinion of the Court—Hoffman, J.

UNITED STATES *v.* PIO PICO.DISTRICT COURT, DISTRICT OF CALIFORNIA,
SEPTEMBER 21, 1870.

1. MEXICAN GRANT.—Claimants' title confirmed on the equity of a permission to occupy provisionally, and on ancient possession.

Before HOFFMAN, District Judge.

L. D. Latimer, U. S. District Attorney.*Williams & Thornton*, attorneys for claimant.

HOFFMAN, J. It appears in this case that Pio Pico, on the twenty-second day of March, 1831, petitioned Governor Victoria for a provisional grant of the rancho of "Jamul."

On the twentieth April, the Governor granted to the petitioner the right provisionally to occupy one sitio on the place called "Jamul," for the purpose of cultivating the lands, keeping his stock thereon, etc., etc.

On the nineteenth July, Santiago Arguello, military commander of San Diego, and in charge of the civil jurisdiction of the same, in conformity with the Governor's decree, put Pio Pico in provisional possession of the land, assigning to him boundaries, which are described in his report.

Pico thereupon built a house upon the rancho, and occupied it with his family and servants until 1838, when he was driven off by an incursion of the Indians, and his house burnt.

After this time the rancho appears to have been in charge of Juan Foster, his brother-in-law.

On Dec. 23, 1845, Pio Pico, who was then, as first vocal of the Departmental Assembly, acting Governor, presented a petition, setting out the provisional grant previously obtained by himself, and praying a title for the land. On this petition he issued a regular title to himself, but immediately transmitted the *expediente* to the Departmental Assembly, by whom it was referred to the appropriate committee, and on the favorable report of the latter, was finally approved.

In 1853, Gen. Burton, late of the United States Army, acquired Pio Pico's title, under a sale made, it is said,

without authority, by Juan Foster. Pio Pico has since quit-claimed to the widow and heirs of Gen. Burton his whole interest in the premises.

The documentary evidence on which the claim rests, is of unquestioned authenticity. The petition of Pio Pico, the Governor's concession, and the record of the possession given by Arguello, are found in the archives.

Those records also contain the *expediente* of the grant by Pio Pico to himself, with the approval of the Departmental Assembly. The grant is also noted in Hartnell's continuation of Jimeno's index, and in the book known as "Tomade Razon."

There appears no room for doubt that, under the provisional grant, Pio Pico took possession, built upon, and occupied the land for about seven years, when he was driven off by the Indians, and that he continued to claim it, and exercise control over it by his brother-in-law up to the time when it was sold by Foster in 1851. In 1853 Gen. Burton acquired the title, and his family, and that of his wife, have continued in the possession and enjoyment of the land up to the present time.

I do not deem it material to consider in the abstract, whether a Governor of California could, under the colonization laws, make a grant to himself, or what validity would in all cases be imparted to such a grant by the approval of the Departmental Assembly.

It may well be, that such a grant, even though confirmed, if made by Pio Pico in the last days of his power, and under the expectation of the impending conquest of the country—if preceded by no preliminary concession, occupation, or settlement, or other circumstance which would create an equity in the grantee's favor, and if followed by no fulfillment during the existence of the former government of those conditions, which under their system constituted the consideration for the grant, should be treated as invalid by the United States. But in this case, the circumstances are quite different. The provisional grant gave to Pio Pico an inchoate or imperfect right. It authorized him to occupy and improve the land under a just expectation, if not an implied promise that the full title should be given him.

1870.]

Syllabus.

When under this authority, and with this expectation, he made his home upon the land, he acquired rights, which, so far as I am informed, were uniformly respected by the former government. No other person would have been able to obtain a grant for the land, and his own application for a full title would have been, unless political or personal hostility on the part of the Governor prevented, at once acceded to.

The action of the Departmental Assembly, whether or not it be regarded as giving absolute validity to his own grant to himself, is, at least, a recognition of his equitable claims and of his right to be secured in his ancient possession.

In the case of *U. S. v. Alviso*, the Supreme Court recognized and enforced the equities growing out of a possession of fourteen years, begun under a provisional permission to occupy while the *expediente* was being formed.

In the case at bar the possession had continued for more than sixteen years up to the time of the change of flags, since that time it has continued uninterrupted and undisputed up to the present moment, a period from its commencement of nearly forty years. I am clearly of opinion that the manifest justice of this claim, as well as the principles established by the Supreme Court, demand its confirmation.

A decree to that effect in favor of the widow and heirs of the late Gen. Burton, will accordingly be entered.

In re LADY BRYAN COMPANY.

CIRCUIT COURT, DISTRICT OF NEVADA,

SEPTEMBER 26, 1870.

1. JURISDICTION OF REGISTER.—Where a petition in bankruptcy is filed in the name and on behalf of a corporation without proper authority, the Register acquires no jurisdiction to adjudge the corporation a bankrupt.
2. AUTHORITY, WHAT.—Under the provisions of the thirty-seventh section of the Bankrupt Act, the filing of a petition on behalf of a corporation, can only be “duly authorized by a vote of the majority of the corporators at any legal meeting called for the purpose.”

Statement of the Case.

[Sept.]

3. WHO ARE CORPORATORS.—A “corporator,” within the meaning of the Act, is one of the constituents or stockholders of the corporation.
4. TRUSTEES CANNOT AUTHORIZE.—Although the management of the affairs of a corporation is committed by the laws of the State to a Board of Trustees, such Board cannot authorize the filing of a petition in bankruptcy, under an Act of Congress, devolving that authority upon a majority of the corporators to be exercised at a meeting called for the purpose.
5. ORDER OF REGISTER VACATED.—Where the Register in bankruptcy adjudged a corporation to be a bankrupt upon a petition filed upon the authority of the Board of Trustees, the adjudication was set aside by the District Court on petition of an attaching creditor, and this action affirmed by the Circuit Court.
6. SUBSEQUENT RATIFICATION.—A ratification of the action of the Trustees and the Register by the stockholders, after the adjudication in such case, does not cure the defect of want of jurisdiction of the Register at the commencement of proceedings, and at the time of the adjudication.

Before SAWYER, Circuit Judge.

Motion of a creditor, having a lien by attachment, to vacate the order adjudging a corporation a bankrupt.

The facts are as follows:

The Lady Bryan Mining Company is a corporation organized under the laws of Nevada, and carrying on the business of mining in Storey County. On August 15, 1870, its Board of Trustees, at a meeting thereof, authorized George W. Hopkins, the Secretary of the Company, to file a petition for the purpose of having the said company adjudged a bankrupt. The petition was filed pursuant to such authority, August 17. Thereupon and prior to August 31, the Register adjudged the corporation to be a bankrupt. August 29, the Board of Trustees called a stockholders' meeting, to be held at Virginia City, on the 31st of that month. A meeting of the stockholders was held on that day, at which four stockholders, representing thirteen thousand three hundred and eighty-nine shares, were present. At this meeting a resolution was passed ratifying the action of the Secretary in filing the petition, and of the Register adjudging the company a bankrupt.

The total number of shares into which the capital stock of the company is divided, is eighteen thousand.

Ely Johnson, the moving party, is a creditor having a lien by attachment upon the property of the corporation.

1870.]

Opinion of the Court—Sawyer, J.

Upon these facts the District Court held:

1st. That the Board of Trustees had no power to authorize the Secretary to file the petition, and that such filing gave the Court no jurisdiction to adjudge the corporation a bankrupt.

2d. That the only reasonable construction of the words "majority of the corporators" in the thirty-seventh section of the Bankrupt Act, is, that interpretation which will enable the holders of a majority of the shares of the capital stock to authorize the filing of a petition under that section.

3d. That when a corporation seeks to avail itself of the provisions of the Bankrupt Act, it can do so only in the mode prescribed by the act, and that the petition in bankruptcy can only be filed by authority of the corporators holding a majority of the shares of stock given at a legal meeting called for that express purpose.

4th. That where, as in this case, the commencement of proceedings is unauthorized and void, no subsequent ratification by the corporators can make the proceedings valid. And an order was made vacating the adjudication.

After the entry of this order in the District Court, a petition was filed by the corporation in the Circuit Court, praying that it might be reversed.

Thos. H. Williams, for petitioner.

R. S. Mesick, for petitioning creditor.

SAWYER, Circuit Judge. I am satisfied that the action of the District Court, in vacating the order of the Register in Bankruptcy, is correct. The petition in bankruptcy was filed without proper authority, and the Register acquired no jurisdiction. The petition, under the thirty-seventh section, must be "duly authorized by a vote of the majority of the corporators at any legal meeting called for the purpose."

No other petition on behalf of the corporation, can be recognized under the Act. A "corporator," as understood both in the law respecting corporations, and in common speech, is "one who is a member of a corporation." That is to say, one of the constituents, or stockholders, of the

corporation. I do not know that the word has ever been used in any other sense.

We do not know what motive induced the limitation to corporators, but, probably, it was supposed, that, in a matter of so great importance, the constituent members of the corporation ought to be consulted. Whatever the motive, this is the provision of the act, and we are not authorized by a strained or fanciful construction to make it something else. It is the province of Courts to interpret, and not to make, statutes.

The management of the ordinary business of corporations in the State of Nevada, by the provisions of the statutes of the State, has been committed to a Board of Trustees, but it does not follow that the trustees may authorize the filing of a petition in bankruptcy under the Act of Congress. Congress has power to pass a general bankrupt act, and to prescribe the conditions upon which the benefits of the act may be attained, and the mode of procedure for their attainment; and when prescribed, those conditions must be complied with. It is no interference with the State laws respecting corporations to require the consent of the corporators in person, rather than of the Board of Trustees, as a condition precedent to the filing of a petition in bankruptcy; and this condition has been imposed by the Bankrupt Act. For this purpose the action of the Board of Trustees cannot be regarded as the action of the corporators. The corporators themselves must act in a meeting "called for that purpose."

I am, also, of opinion, that the act of the Register being void for want of jurisdiction at the time the order was made, a subsequent ratification by the stockholders could not render it valid. It is not a matter of *agency*, so far as the authority of the Register is concerned, but of *jurisdiction*.

The petition itself shows the authority upon which it was filed, to be a resolution passed by the Board of Trustees, and, consequently, the want of due authority, and of jurisdiction, appears upon the face of the record.

The petition must be denied, and the order of the District Judge affirmed. Ordered accordingly.

1870.]

Opinion of the Court—Hoffman, J.

JOHN FRANCIS *et al.* v. THE BARQUE HARRISON, ETC.,
JOHN KENTFIELD *et al.*, *Intervenors*.

DISTRICT COURT, DISTRICT OF CALIFORNIA,
SEPTEMBER 26, 1870.

1. ADMIRALTY.—DOMESTIC MATERIAL MEN.—MORTGAGEE.—The lien of domestic material men will be enforced against proceeds in the registry in preference to the demand of a subsequent mortgagee of the vessel, notwithstanding that since the repeal of the 12th rule in Admiralty, such liens cannot be enforced in this Court by a proceeding *in rem*, nor in the State Courts by any proceeding which involves the exercise of admiralty jurisdiction.

Before HOFFMAN, District Judge.

Milton Andros, proctor for intervenors.

W. W. Cope, proctor for mortgagee.

HOFFMAN, J. The question presented in this case is whether a material man claiming a lien under the laws of this State upon a domestic vessel, is entitled to payment out of the surplus proceeds in the registry, in preference to a mortgagee of the vessel.

By the VI chapter of the Practice Act of California, it is provided that all steamers, vessels, etc., “shall be liable for supplies furnished for their use at the request of their respective owners, masters, agents and consignees, and for materials furnished for their construction, repair or equipment.”

The Act further provides, “that said several causes of action shall constitute liens upon all steamers, vessels and boats, and have priority of payment in their order herein enumerated, and shall have preference over all other demands; provided, such liens shall only continue in force for the period of one year from the time the cause of action occurred.”

If this statute be constitutional and operative, it is evident that the material man has by law a lien and right to priority of payment in preference to all other demands; and that this right must be recognized by the Court which has

in its possession the surplus proceeds which remain after satisfying the maritime liens on the vessel.

From the time of the decision in the case of the *General Smith* (4 Wheat. 438), the Supreme Court has held in numerous cases that no lien was created by the maritime law in favor of material men supplying domestic ships in their home ports.

In respect to demands of this description, "the case is governed," says the Supreme Court, "altogether by the municipal law of the State, and no lien is implied unless it is recognized by that law." (4 Wheat. 438; *Peyroux v. Howard*, 7 Peters, 324.)

It was further held that when such liens were recognized by the State law, they might be enforced in the District Courts, according to the course of the admiralty.

The 12th rule in Admiralty, adopted by the Supreme Court in 1844, expressly provides "that proceedings *in rem* shall apply to cases of domestic ships where by the local law a lien is given to material men for repairs, supplies, and other necessities." No recognition could therefore be more emphatic of the constitutionality of State laws creating liens of this description, and of the jurisdiction of the National Courts to enforce them.

The distinction too, between the rights created by the State law, and the remedy afforded by it, was also recognised—for the National Courts enforced the right by an admiralty proceeding, in the usual form, and not in the manner prescribed by the State law.

In 1858, the 12th rule was repealed, and proceedings *in rem*, in cases of domestic ships for supplies, repairs, or other necessities, were prohibited.

The reasons for the repeal of the rule are given by the Court in the case of the *St. Lawrence* (1 Black. 522). The Court says: "The State lien was, however, enforced, not as a right which the Court was bound to carry into execution upon the application of the party, but as a discretionary power which the Court might lawfully exercise for the purpose of justice, when it did not involve controversies beyond the limits of admiralty jurisdiction."

1870.]

Opinion of the Court—Hoffman, J.

The Court, after referring to the inconveniences of enforcing such liens in the admiralty, says:

“Such duties and powers are appropriate to the Courts of the State which created the lien, and are entirely alien to the purposes for which the admiralty power was created, and form no part of the code of laws which it was established to administer.” (p. 531.)

We have here a distinct recognition of the right of the States to create liens on domestic vessels in cases where none exists by maritime law, and to enforce them by appropriate proceeding.

In the case of the *Belfast* (7 Wall. 645), which is the latest decision on the subject, it is held that the States “may create these liens, and enact reasonable rules and regulations for their enforcement.”

It is apparent, therefore—

1st. That the contract of a domestic material man is a maritime contract, and of admiralty jurisdiction.

2d. That it may still be enforced in the admiralty by a suit *in personam*; and might constitutionally be enforced by a proceeding *in rem*, where a lien has been by the State law engrafted on the contract. But that on grounds of convenience this proceeding has been prohibited.

3d. That liens created in such cases by State laws are valid, and the States may provide reasonable rules and regulations for their enforcement in their own Courts.

It is contended that, as a necessary consequence of these propositions, the State Legislatures have the right to authorize a proceeding *in rem* to enforce liens created by State laws, and not existing under the maritime law.

In support of this view, various authorities are cited: *The Steamship Circassia*, 50 Barb. 490; 50 Barb. 501; 4 Ill. 504; 4 Mo. 244; 41 Mo. 491; 2 Pars. Adm. L. secs. 154–5; Am. L. Reg. July, 1870.

It is urged that in the cases of *The Moses Taylor* (4 Wall. 411), and *Hine v. Trevor* (4 Wall. 555), where a contrary doctrine is supposed to have been held, the liens attempted to be enforced in the State Courts by a proceeding *in rem*, were not liens owing their existence solely to

the State law, but were liens created by the general law maritime.

That the question before the Court was as to the validity of a pretension avowedly set up by the State Courts to exercise general admiralty jurisdiction concurrently with the United States Courts of Admiralty.

That the right of the States to authorize proceedings *in rem* to enforce liens created by State laws, was not in question; and that the language of the Court must be construed with reference to the circumstances of the cases presented.

That in subsequent cases the Supreme Court has explicitly declared the power and duty to enforce liens of this class, to be appropriate to the Courts of the State which created the lien (*The St. Lawrence, ubi. sup.*), and that the States may provide for their enforcement, "by reasonable rules and regulations." (*The Belfast, ubi. sup.*) That the proceeding *in rem* is the most speedy, appropriate and effectual, if not the only practical, means of giving effect to these liens. That to deny the right of the material man to avail himself of that proceeding in a State Court, and at the same time to decline to enforce his lien in the admiralty, is to leave him without a remedy, and to reduce the declaration of the validity of his lien to the announcement of a barren proposition, unaccompanied by any substantial right, or available means of enforcing it.

The force of these suggestions is admitted. It has been recognized in the cases above cited. But in my opinion the answer to them is conclusive.

In the cases of the *Moses Taylor*, and *Hine v. Trevor*, the general principle is established that "whenever the District Courts of the United States have original cognizance of admiralty causes by virtue of the Act of 1789, that cognizance is exclusive, and no other Court, State or Federal, can exercise it, with the exception always of such concurrent remedy as is given by the common law."

"This," it is announced in *Hine v. Trevor*, "must be taken as the settled law of the Court."

It is also in those cases explicitly declared that a proceeding *in rem* is not a remedy afforded by the common law,

1870.]

Opinion of the Court—Hoffman, J.

and therefore not within the exception which saves to suitors such concurrent remedy as is given by the common law.

We have already seen that the contract of the domestic material man is of original admiralty cognizance in the District Courts of the United States. The case therefore clearly falls within the principle laid down by the Supreme Court. To interpolate into the doctrine as announced by the Court, the exception in favor of proceedings *in rem* to enforce liens, attached by State laws to a certain class of maritime contracts, would not only be inconsistent with the language of the Supreme Court, and with the principles on which the decision rests, but would give rise to great embarrassments and perplexities.

If proceedings *in rem* are allowed in the State Courts, to enforce the liens in question, all holders of maritime liens should be allowed to intervene and establish and enforce their claims according to their respective priorities. If the State Courts proceed to adjudicate upon these claims, they will unquestionably be exercising admiralty jurisdiction, and might do so to any extent under cover of a proceeding initiated by the domestic lien holder. If they decline to entertain such claims, how can justice be done?

Again.—If the holder of the maritime lien should resort to the Court of Admiralty, a conflict of jurisdiction would ensue, for another tribunal, authorized to exercise jurisdiction *in rem*, would be already in possession of the vessel.

The State Courts are necessarily bound to pursue exactly the provisions of the statutes under which they acquire jurisdiction. In the California Act, six classes of cases are enumerated, in which alone liens are to be enforced, or, it would seem, recognized—

1. For services rendered on board vessels.
2. For supplies furnished to them.
3. For materials furnished in their construction, repairs, etc.
4. For wharfage and anchorage within the State.
5. For non-performance or mal-performance of any contract for the transportation of property or persons.
- 6—For injuries committed by them to persons or property.

These liens are declared to have priority in the order in which they are enumerated, and the provisions of the law embrace “all steamers, boats and vessels”—foreign as well as domestic.

When judgment is obtained against any vessel, the Sheriff is directed to apply the proceeds of the sale—

1st—To the payment of the wages of mariners, boatmen, etc.

2d—To the payment of the judgment and costs.

3d—To pay over any balance to the owner, master, agent or consignee, who may have appeared in the action.

The rights of salvors, the holders of bottomry bonds, and perhaps of those who have advanced moneys to the master, seem thus to be wholly ignored, while an attempt is made to fix the respective rank of liens, some of which are confessedly maritime.

The Sheriff is directed in all cases, after paying any claims for wages, to apply the proceeds to the satisfaction of the judgment—that is, the payment of the particular lien on which suit is brought. The balance he is to pay to the owner of the vessel.

Neither the bottomry bondholder or the salvor is authorized to intervene in the suit; nor is either allowed by the statute to attach the vessel to enforce his demand.

No provision is made for any proclamation, publication, or other notice to parties interested in the vessel, except that a summons is to be served on the master, mate, or other person in charge. The vessel is seized under a process of attachment, and the other proceedings are to be conducted in the same manner as in actions against individuals. When judgment is recovered, the vessel is sold under an execution issued to the Sheriff, and the proceeds are distributed as already stated.

The Supreme Court in *The Moses Taylor* considered the action authorized by the statute of California: “a proceeding in the nature and with the incidents of a suit in admiralty, and observes, that “the jurisdiction of the Courts of California is maintained on the assumed ground, that the cognizance by the National Courts of civil causes of

1870.]

Opinion of the Court—Hoffman, J.

admiralty and maritime jurisdiction is not exclusive, as declared by the ninth section of the Judiciary Act of 1789."

It was to this claim, on the part of the States, to concurrent jurisdiction on admiralty causes, that its attention was chiefly directed.

It is unnecessary to consider whether the proceeding under the statute of California has all the incidents of a suit *in rem* in the admiralty, or to inquire what is the nature of the title obtained by the purchaser under an execution issued in such a proceeding.

It is decided "that the statute of California, to the extent to which it authorizes actions *in rem* against vessels for causes of action cognizable in the admiralty, invests her Courts with admiralty jurisdiction," and is therefore unconstitutional. The statute has been referred to in this opinion to illustrate the difficulties which attend the exercise by State tribunals of any jurisdiction *in rem* or *quasi in rem* in cases of admiralty cognizance, and the reasonableness as well as policy of the simple and clear principle announced by the Supreme Court, that in all such cases the jurisdiction of the Courts of Admiralty is exclusive, except so far as a concurrent remedy exists at common law, and that a proceeding *in rem*, authorized by a State statute, is not such a concurrent remedy.

Nor is it true that if the right to proceed *in rem* in the State Courts be denied to the material man, he is left wholly without remedy. His lien may be enforced like any other mortgage, by appropriate proceedings.

The right of prior satisfaction out of the proceeds of the sale on execution against the owner of any vessel may be conferred, on the material man, by law, and his lien may be recognized and enforced in the distribution of estates of deceased persons, or of bankrupts. It may also be recognized by Courts of Admiralty, when disposing of remnants and surplus proceeds in the registry.

In these and other ways, the lien created by State laws may become effectual. And it is to be supposed that it was to provisions of this character that the Supreme Court re-

ferred when it observed that the States might enact reasonable rules and regulations for their enforcement.

This construction of the language of the opinion in the *Belfast* is more reasonable than to suppose that the Court referred to proceedings *in rem*, and thus overruled the doctrine clearly announced in the *Moses Taylor* and *M. Hine v. Trevor*, that such a proceeding in a State Court was inadmissible in any case of which the District Courts of the United States have original cognizance, as an Admiralty cause.

From the foregoing, it results that the State law is invalid only so far as it attempts to authorize actions *in rem*, against vessels for causes of action cognizable in the admiralty; but the validity of the lien itself, especially when given by the State law in general terms, without specific conditions and limitations, inconsistent with the rules and principles which govern implied admiralty liens, is, as is said in the case of the *St. Lawrence*, “undoubted.”

It is urged, that inasmuch as the remedy, by a proceeding *in rem*, afforded by the statute, is unconstitutional, the right is totally lost, and the lien created must be treated as nonexistent.

But we have seen that the lien is created by the California statute in general terms. “The said several causes of action shall constitute liens upon all steamers, vessels,” etc. A mode of enforcing these liens is provided, but it is not declared that this remedy shall be exclusive, nor that the Courts shall refuse to recognize the liens except in the proceeding authorized by the statute.

It is probable that in all the cases where, under the former twelfth rule, liens conferred by State laws were enforced by the Admiralty Courts, those laws authorized a proceeding *in rem* in the State Courts—or a suit against the vessel by name—but this circumstance did not impair the validity of the liens, nor affect the right of the Admiralty Courts to enforce them. A right which they still retain, though its exercise has been prohibited on grounds of expediency.

The New York statute, under which the Supreme Court held that an “undoubted lien” was acquired, provided, like the California statute, for an action against the vessel by

1870.]

Opinion of the Court—Hoffman, J.

name, and authorized a proceeding much more closely resembling a suit in Admiralty. It results, that the States have clearly the power to engraft upon such causes of action cognizable in the Admiralty, liens which, although they cannot be enforced in the State Courts, by a suit in Admiralty, or a proceeding *in rem*, are nevertheless valid, and should be recognized by this Court in the distribution of surplus proceeds of any vessel sold to satisfy a maritime lien, or, by parity of reasoning, which have come into its possession under a proceeding in bankruptcy.

No question was raised at the hearing, as to the respective priorities of persons claiming liens under the State laws, and the holders of a prior mortgage recorded under the laws of the United States—for the claims of material men which accrued prior to the date of the mortgage, are sufficient to absorb all the surplus proceeds in the registry.

The fund in Court must, therefore, be applied, first, to the satisfaction of any maritime lien which has been proved.

Second, to the payment *pro rata* of the claims of material men entitled to liens under the State law. An order to this effect will be entered.

Since the above was written, the Supreme Court of this State has decided that a State law authorizing a proceeding *in rem* by a domestic material man for supplies furnished in the home port of a vessel, is unconstitutional.

NOTE.—The foregoing decision, which seems to be the necessary result of the principles established by the Supreme Court, involves the anomaly of admitting the validity of a lien created by State laws, and at the same time denying the right to enforce it by the most appropriate and effectual means, viz: a proceeding *in rem*. This, and other difficulties which beset the subject, owe their origin to early decisions of the Supreme Court, rendered at a time when the nature and extent of the grant of Admiralty and maritime jurisdiction had been imperfectly investigated, and when the more liberal views with regard to the powers and duties of American Courts of Admiralty, which have since been adopted, had hardly been suggested.

In *The Gen. Smith* it was held that no lien is implied by

the maritime law in favor of persons furnishing repairs and necessities to a vessel in a port of a State to which she belongs.

The operation of the principle thus announced, was in some degree mitigated by subsequent decisions, which held that even in the case of domestic vessels, a lien created by State laws might be enforced in the Admiralty.

This remedy being now prohibited, while the power of the States to authorize a proceeding *in rem* in their own Courts, is at the same time denied, it seems not improper to revisit the foundations of the doctrine which has produced this anomalous result, and to inquire how far it is reconcilable with the maritime law and the recent and more liberal principles established by the Supreme Court.†

“It is,” Mr. J. Ware observes, “a general principle of law extending to a great variety of cases, that a person who has by his own labor added a new value to a specific article, has a lien on that article for the value of his service. It is a right consonant to all ideas of natural equity, and is highly favored by law (2 Kent’s Comm. 496). The mechanic is considered as gaining a qualified property in the article when he has incorporated into it his own skill, care and labor.

†By the Roman law, the privilege of those who lent money to purchase, build or repair a ship, was exclusively personal. It had no effect against those who were secured by express hypothecations. By the maritime law, every privilege imparted a tacit hypothecation or lien, which differs from an ordinary hypothecation in this, that the latter is governed by the date of the contract, while the privilege of the former is regulated by the degree of favor due to the particular claim. (See *The Young Mechanic*, 2 Curtis, 404.)

The liens for seaman’s wages for moneys advanced on bottomry bonds, for repairs and necessities in the course of the voyage, are, therefore, preferred to that of a mortgagee prior in date.

If it be admitted that the domestic material man has no maritime lien, and if the States have no power to create new maritime liens, or affect their priorities, the liens under the State laws will be regulated by their date and not by the favor due them.

And thus in the distribution of surplus proceeds in the registry, the Court might be compelled to accord to a mortgagee recorded under the laws of the United States, a preference over the claims of a material man, who might subsequently to the mortgage, have by his labor imparted a greatly increased value to the ship. (See *In re Dwight Scott*, a bankrupt, U. S. District Court, N. D., Ohio, reported in *Chicago Leg. News*, Sept. 10th, 1870, p. 398.)

1870.]

Opinion of the Court—Hoffman, J.

“Another general principle is, that when this sort of confusion of goods is produced at the request of the general owner, he that has given the last increment of value to the article is entitled to be first satisfied out of the common stock. In the nature and reason of the thing, there is no difference in this respect between the mechanic and the carrier.” (*Poland v. The Spartan*, Ware R. 138.)

This right is recognized by the common law wherever the person claiming it is in possession of the article with which his labor and materials have been incorporated, and by the maritime law as giving rise to a privilege or right of prior satisfaction out of the thing itself, except where that privilege has been voluntarily renounced by an agreement incompatible with its exercise, or an exclusively personal credit has been given.

“There is nothing,” says Emerigon, “which is regarded with so much favor as debts for work and labor furnished to a vessel. Commerce and the country at large are interested in them. It is right that workmen and material men should enjoy the real lien, which is given them by the ‘*Ordonnance de la Marine*.’ They cannot be deprived of it, unless it is proved that they contracted on the faith of the person and not of the thing.” (Emerigon, *contr. a la Grosse*, chapter XII, sec. 3.)

In most of the States, the defects of the common law have been supplied by statutes. The law of California gives to artisans, machinists, builders, mechanics, material men, laborers, miners, etc., liens upon buildings, wharves, bridges, ditches, flumes, tunnels, sluices, machinery, aqueducts, etc., for which they have furnished materials or labor, and to enforce these liens, remedies partaking of the nature of a proceeding *in rem* have been provided. The decision in the case of *The General Smith* has also given rise to the statutes, by which the rights of those who supply or repair vessels have received similar protection, and the supposed defect of the maritime law has been supplied.

But this attempt to enforce rights so agreeable to our ideas of natural justice has proved in a great measure abortive. For the Admiralty Courts, though retaining jurisdic-

tion of the contract *in personam*, decline to enforce the lien, and the State Courts are without power to resort to a proceeding *in rem*.

That material men, that is, those who furnish material or labor in building or repairing vessels, or necessary supplies for their outfit, have, by the general maritime law, a lien on the vessel for their security, cannot be disputed.

Article XVI, Liv. I, Tit. XIV of the Marine Ordonnance, places the lien of material men who have furnished supplies, etc., before the departure of the vessel, in the third rank, postponing their claims only to those of mariners for wages, and those who have furnished money for the necessities of the ship during her last voyage.

The Ordonnance itself is said to have been “formed on the general jurisprudence of Europe, and for this purpose information was sought, at enormous expense, in all the ports of the continent.” (Preface to Valin’s Com. on Ordonnance de la Marine, p. IV.)

“It was at once adopted by foreign nations,” says Valin, “as an eternal monument of wisdom and intelligence, and it has ever since commanded the admiration of all civilians and lawyers, and has obtained the respect of every maritime State.”

It, therefore, affords the highest evidence of the general maritime law, as administered in the Admiralty tribunals of Europe, and derived from the ancient laws of the sea. (See Appendix to 2 Pet. Adm. Dec., p. 1; *The Calisto Davies* R. 31.)

It is said by Mr. J. Ware (*The Calisto ubi sup.*) that this principle of maritime law is not acknowledged by the common law, and has never been received by the commercial jurisprudence of England.

Undoubtedly the English common law Courts hold that although by the maritime law every contract with the master of a ship implies an hypothecation, yet that it is otherwise by the law of England, unless expressly so agreed; and this doctrine has not only been recognized by the Courts of Chancery, and in the distribution of bankrupts’ estates, but prohibitions have been granted to the Court of

1870.]

Opinion of the Court—Hoffman, J.

Admiralty to stay proceedings *in rem* to enforce the lien given by the maritime law. (Abbott on Ship, 143, *et seq.*)

But it is not true that the principles of the maritime law, with respect to these liens, were never adopted into the jurisprudence of England, or that the Court of Admiralty was always forbidden to enforce them.

In the articles drawn up in the reign of Charles I. to accommodate the differences between His Majesty's Courts of Westminster and his Court of Admiralty, which were debated in the presence of the King and all the Lords of his Council, twenty-three in number, and which were agreed to by the Judges of the Courts at Westminster, and by the Judge of the Court of Admiralty, it is provided:

“3d. If suit shall be in the Court of Admiralty for building, amending, saving or necessary victualing of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be granted, though this be done within the realm.” (Cited in Bened. Adm'y, p. 51; also in *De Lovio v. Boit*, 2 Gall. 249, in note.)

In 1648, disputes having arisen between the Courts of Common Law and the Courts of Admiralty, an ordinance was passed by the Lords and Commons assembled in Parliament, defining the jurisdiction of the Court of Admiralty.

It provided “that the Court of Admiralty shall have cognizance and jurisdiction against the ship or vessel, with the tackle, apparel and furniture thereof, in all causes which concern the repairing, victualing and furnishing provisions for the setting of such ships or vessels to sea.” This ordinance ceased to be in force at the restoration. Prohibitions were again issued by the Common Law Judges, and the Admiralty, weary of the struggle, appears to have abandoned all further efforts to retain its ancient authority. (Benedict, p. 58.)

Although the Common Law Courts have thus finally succeeded in preventing the incorporation into the jurisprudence of England of the just and rational principles of the maritime law, with respect to the liens of material men, yet it clearly appears that those principles were zealously main-

tained by some of her ablest lawyers, and even for a considerable time adopted and enforced by the Court of Admiralty, with the sanction of the King's Council, and of all the judges, and subsequently under an Act of Parliament.

The Admiralty Courts of America have long ceased to be governed by the arbitrary and irrational restrictions imposed by the Common Law Courts of England upon the Admiralty Court of that country.

The maritime jurisdiction of the Admiralty Courts of the United States is, "that jurisdiction which commercial convenience, public policy and national rights have contributed to establish with slight deficiency over all Europe—that jurisdiction which, under the name of Consular Courts, first established itself on the shores of the Mediterranean, and from the general equity and simplicity of its proceedings, soon commended itself to all the maritime States; that jurisdiction, in short, which, collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable *Consolato del Mare*, and still continues in its decisions to regulate the commerce, the intercourse and the warfare of mankind." (*De Lovio v. Boit.*, 2 Gall. 472.)

The American Courts of Admiralty freely recognize and enforce the liens created by the maritime law in favor of shippers of goods, and of material men who supply foreign ships.

In matters of tort, the jurisdiction is determined by locality, and in those of contract by the subject matter; and it embraces torts committed upon, and contracts relating to the trade, business and navigation of not merely the sea or tide waters, but of our inland lakes, and great navigable rivers.

In the exercise of this jurisdiction, our Admiralty Courts are governed, not by the common law of England, but by the principles of the general law maritime, as embodied in the ancient laws of the sea, as expounded by the great jurisconsults of Europe, and illustrated and adorned by the genius and learning of the English Admiralty judges in those cases in which the bigotry of the Courts of common

1870.]

Opinion of the Court—Hoffman, J.

law has suffered them to retain Admiralty jurisdiction, and to apply the principles of the maritime law.

But the progress towards these enlarged and liberal ideas has been slow, and marked with occasional hesitation and inconsistencies. The influence of the decisions of the common law judges of England is still discernible in this branch of our jurisprudence. We adopt the principle of the maritime law which gives to the material man a lien upon a foreign ship, and for this purpose we regard as foreign, ships, the owners of which reside in another State; but we refuse to recognize the lien of the builder or furnisher of a domestic vessel, although that lien is unquestionably allowed by the maritime law.

The received doctrine involves an even greater departure from the rules of that law—for it not only refuses to adopt them in the case of domestic material men, but by admitting a liability *in personam*, enforceable in the Admiralty against the owners, it violates its fundamental principles and analogies.

In the infancy of modern commerce the master of a vessel was regarded as the *gerant*, or active partner of a *societe en commandite*. His contracts bound himself, and operated a tacit hypothecation of the vessel. He could bind the property committed to his charge, but he had no power to engage the private fortunes of the owners, unless under a special authority for the purpose. The creditor being thus restricted to a particular fund, the maritime law permitted him to proceed directly against it in specie, and gave him a privilege or *jus in re* in it as against the general creditors of, or purchasers from, the owner.

This principle, which appears to have been highly favored, and to have been recognized by nearly all the maritime codes of the middle ages, does not, says Mr. J. Ware (The Rebecca Ware's R. 202), seem to have reached England, or at least was not adopted there as a general commercial custom; but its justice and policy have been recognized in recent statutes of Great Britain and the United States by which the liability of owners is restricted in certain cases to the value of their interest in the vessel and freight.

The liability, therefore, of the owner on the contracts of the master was, as observed by Emerigon, real rather than personal.

Article II, Tit. VIII, liv. II of the Ordonnance de la Marine adopted in Art. 216 of the Code de Commerce, was variously interpreted by the Commentators and the Courts. Valin held that the owner's right to be discharged from the obligations of the master, by giving up the vessel and freight, applied only to the obligations arising from his negligence or torts. Emerigon and Pothier maintained that it embraced all obligations *ex contractu* as well as *ex delicto*. This question after much discussion, was finally settled in France, in accordance with the unanimous demand of the commercial interests, and with the approval of all the Courts, by the adoption, in 1841, of the amended article 216 of the Code de Commerce.

By this article, the proprietor of a ship is made civilly responsible for all the acts of the master, and for the obligations contracted by him relative to the ship or the adventure. But he may in all cases discharge himself from these obligations by abandoning the ship and freight. (Rogron's Code de Com., Liv. II, Tit. 3d, Art. 216.)

This recent Legislative interpretation in France of the provisions of the Marine Ordinance, is not cited as authority. But its unanimous approval by the French Courts and juriconsults, so thoroughly versed in the rules, and profoundly imbued with the principles of the maritime law, may be received as high evidence of what that law is. And it serves to show how repugnant it would be to its fundamental principles to hold that the master may bind his owners personally by his contracts, to the whole extent of their private fortunes, or their "land goods," without binding the ship or creating any lien upon her.

It has been suggested that the lien of the domestic material man is denied because he is presumed to have contracted on the personal credit of the owner. This is obviously not a reason, but merely a mode of stating the proposition. The presumption of an exclusive personal credit is, in the case of supplies furnished to coasters and

1870.]

Opinion of the Court—Hoffman, J.

the small craft which navigate our inland waters, in most instances, untrue in point of fact; nor can I perceive how such a presumption can now be indulged, for the Supreme Court in the case of *The Belfast* has decided that a maritime lien exists in favor of the shipper of goods, although the voyage is to be performed wholly within the limits of the State of which all the parties are residents.

If the freighter of goods on one of our river steamers, or the deck-hand, is not deemed to have contracted on the personal credit of the wealthy corporation which owns the line, with what reason can the mechanic who has repaired a steamer be presumed to have done so?

The same remark may be applied to cases of pilotage and towage, which are generally admitted to give rise to a maritime lien irrespective of the residence of the owners of the vessel.

The attempt to mitigate the effects of the doctrine we are considering by treating the States as foreign to each other, and regarding vessels as “domestic,” only when in the ports of the State where their owners reside, will be found, not only to give rise to insuperable difficulties, and to lead to absurd consequences, but to rest on very unsatisfactory grounds.

A few illustrations will expose its practical operation. If, for example, a person who resides in New York, where his business and credit are established, sends a vessel to be repaired in Jersey City, the mechanic will be allowed a lien, while if he sends her to Brooklyn no lien will be implied. But if the same person should in the succeeding year fix his residence in Jersey City, though he still carries on his business in New York, the case will be precisely reversed.

So if one own a vessel navigating the lakes, the mechanic will be denied a lien for repairs made at Buffalo, if the owner resides anywhere in the State of New York, while the lien will be allowed if the repairs are made at Jersey City on the order of any New York owner, no matter though he be the wealthiest and best known merchant or corporation of the city.

So, if a vessel be owned by two persons, one of whom

resides at New Orleans and the other at St. Louis, between which ports the vessel plies, and at each of which the resident owner conducts her business, is the vessel to be deemed to “belong” to Missouri or Louisiana? At which of the termini of the voyage is the mechanic who repairs her to be allowed a lien? At both, or at neither?

In truth, the notion that vessels belong to the State where the owners happen to reside, or that they are to be treated when in a port of that State as “domestic vessels,” seems to have been adopted on insufficient consideration.

All registered and enrolled vessels, are vessels of the United States, and whether navigating the ocean, the lakes, or the great rivers of the country, are subject to admiralty jurisdiction, both in matters of tort and contract. Congress has regulated not only their registry and enrollment, and the mode in which they may be transferred and mortgaged, but has also, especially in the case of steamers, prescribed rules for their equipment and furniture, and for the transportation of passengers, and has subjected them to inspection by United States officers, and provided for the licensing of the pilots and engineers. They are thus, vessels of the United States, and are all domestic vessels, belonging to citizens of the United States.

The classification, therefore, of vessels as domestic and foreign, or quasi-foreign, according to the residence of the owner within or without the State, at a port of which they have been repaired or supplied, seems arbitrary and unsound. Especially when this classification is resorted to in but a single case, and for the purpose of excluding a lien allowed by the maritime law, and which has the most solid foundation in natural justice. (Benedict's Adm. § 273; *The St. Iago de Cuba*, 5 Pet. Con. R. 630.)

Our attention has thus far been confined to the broad doctrine that no lien is implied by the maritime law in favor of domestic material men, although the supplies have been ordered by the master with the owner's consent, or by the owner himself—and when the personal liability of the owner is admitted. It may be said, however, that the master's authority ceases on his arrival at the port of his owner's

1870.]

Opinion of the Court—Hoffman, J.

residence, and that unless expressly empowered by the latter, his contracts ought not to bind the vessel.

But this restriction upon the master's authority could, at most, be imposed only when the vessel is in the place where her owner resides—her home port. "An epithet which," says Mr. Ch. J. Marshall, "has no necessary reference to State or 'other limits.'" (*The St. Iago de Cuba, ubi sup.*) On principle, the determination of the master's agency should depend on the readiness with which the owner may be consulted, the urgency of the necessity for repairs or supplies, the authority, real or apparent, which the owner may have held him out as possessing, and the means which third persons may have possessed of ascertaining the extent of the powers confided to him.

In this view, the mechanic, who by the master's order, repairs, in Jersey City, a vessel belonging to a wealthy and well-known merchant, or corporation of New York, should not be entitled to recourse against the vessel, or her owners, any more than he who makes like repairs in Brooklyn, while conversely, the New York mechanic should, under certain circumstances, have both remedies, notwithstanding that the owner may reside in a remote part of the same State.

The taking of goods on freight, the shipping of a crew, the procuring supplies for them and the vessel, as well as the making of ordinary repairs, are within the usual scope of the master's duty and authority. (See Curtis on Mer. Seam. p. 172.) On general principles of agency, the owner and *à fortiori* the ship, should be bound by his contracts, unless notice, actual or constructive, be clearly brought home to the person with whom he deals, that he is exceeding the limits of his authority. And on the principles of the maritime law, the liability of the vessel, at least, for the contracts of the master, would seem unquestionable. In article 216 of the Code de Commerce, which, as before stated, was taken from the Marine Ordonnance, the liability of every owner for the obligations of the master, up to the value of the vessel and freight, is established. Under this article it is held that the ship is liable, even though the proprietor or general owner is not armateur or owner for the voyage. (Rogron, Code de Comm., Art. 216.)

And so is our own law. For the vessel is liable *in rem* to seamen, freighters, etc., on the contracts of the master, although she may have been demised or chartered to one who appoints the master, or whose agent he exclusively is.

Article 232 of the Code de Commerce provides for the very case we are considering. This article, which is taken from article XVII, Liv. II, tit. 1 of the Ordonnance, enacts that the captain shall not *in the place of residence* (*dans le lieu de la demeure*) of the owners or their agent, without special authorization, cause repairs to be made, buy sails, cordage, etc., or take up money for the purpose.

Under this article it is held that if the captain should violate it, the proprietors would nevertheless be bound under article 216, to the extent of their interest in the vessel, *i. e.* the vessel would be liable, except for money taken up on bottomry.

The remedy of the owner is against the master for violation of the article, but even this, says Valin, should be subject to his right to be allowed for absolutely necessary supplies, obtained for a reasonable price, however blameable he may be for having acted without authority. (Valin's Com. tom. 1, p. 440.) The fifty-fourth chapter of the Consolato del Mare, and the observations of Valin and Emerigon upon it (Valin's Com. tome. 1, p. 369; Emerigon contr. à la Grosse, Hall's translation, p. 227,) illustrate the favor with which the maritime law regards debts due for work and materials furnished to a vessel.

Both of these great juriconsults agree that workmen employed by a master-carpenter or caulker, who has contracted with the owner, shall have a lien on the vessel for the sums due them, unless they have received actual notice of the arrangement between the owner and contractor.

On this, which is an admitted exception to the ordinary principle of *domino non mandante*, Emerigon observes:

“The carpenters, caulkers and other workmen employed in building, together with the creditors for the timber, cordage and other articles furnished, ought to enjoy the privilege allowed to them, unless they have been warned in due time that if they do not secure the payment of their

1870.]

Opinion of the Court—Hoffman, J.

claims against the contractor, they shall have no lien on the ship. And I do not believe that a simple registry of the contracts would be considered as a notification, within the meaning of the consolato, which requires that notice should be given to the workmen and other material men, in order that they may not be deceived. (Emerigon Contr. á la Grosse, p. 229.)

If the ship is thus liable to workmen employed by a contractor, and not by the owner or master, unless warned by the latter, *á fortiori* should she be liable to workmen employed by the master, unless affected by a similar notice. (See Ch. XXXII and XXXIII, Consulat de la Mer par Boucher, tom. 11, p. 38-9.)

It is thus evident that by the principles and analogies of the maritime law, and the "good customs of the sea," ("*les bonnes coutumes de la mer*," as they are called in the Consolato), and on grounds of equity and natural justice, the lien of the material man who has constructed, repaired or supplied a vessel, ought to be recognized and enforced as a maritime lien by Courts of Admiralty. And this whether the work has been done in a port of the State in which the owner resides, or elsewhere; and whether upon the employment of the master or of the owner, or of his agent—excepting in those cases where the lien has been clearly waived, or "notice has been given to the workmen and other material men, in order that they may not be deceived."

The lien laws of the States, hitherto deemed necessary to obviate the consequences of the decision in the case of *The General Smith*, would seldom or never be resorted to, and the anomalous consequences of the adjudications with regard to them would disappear if it were established "that it is the ship, and not the ship of a particular owner, nor the ship of a particular flag, or national character; not a domestic ship, nor a foreign ship; not a ship in a port of a State to which she does not belong, or in which the owner does not reside, but a ship—every ship—that is bound for the bill of lading, the charter party, the wages of the seamen, repairs, supplies, materials and maritime loans." (1 Bened. R. p. 141.)

WILLIAM C. MCKAY v. JAMES A. CAMPBELL.

CIRCUIT COURT, DISTRICT OF OREGON,
SEPTEMBER 26, 1870.

1. **ERRORS IN PLEADING.—DUPLICITY.**—Duplicity in pleading is forbidden by both the common law and the Code as tending to prolixity and confusion, but under the Code objection to duplicity is to be made by a motion to strike out the pleading rather than by special demurrer as at common law.
2. **IDEM.**—If a complaint contains more than one cause of action they must be separately stated or it will be liable to be stricken out for duplicity.
3. **CONSTRUCTION OF XV AMENDMENT.**—Under the XV amendment to the Constitution and the act of May 31, 1870 (16 Stat. 140), to enforce it, all persons declared citizens of the United States by the XIV amendment are entitled to vote in the States where they reside, at all elections by the people, without distinction of race, color or previous condition of servitude; but the several States, notwithstanding the amendment, have the power to deny the right of suffrage to any citizens of the United States on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civil duties, crime or other cause not specified in the amendment.
4. **IDEM.**—The power of Congress over the subject of the right to vote in the several States is conferred by the XV amendment and is confined to the enforcement of such amendment, by preventing the States from discriminating between citizens of the United States in the matter of the right to vote, on account of race, color or previous condition of servitude.
5. **RIGHT TO VOTE UNDER LAW OF OREGON.**—Under the law of Oregon when a person offers to vote and is duly challenged, thereafter his right to vote depends upon his taking the oath that he is a qualified elector as prescribed in Section 13 of the election law (Or. Code, 700), and it then becomes the duty of the Judges of election to tender him such oath, and administer it to him, if he is willing to take it.
6. **IDEM.**—The taking of this oath by the party offering to vote after he is challenged, is a necessary prerequisite to the right to vote within the meaning of Section 2 of the act of Congress aforesaid, and a refusal or omission upon the part of the judges to give such party an opportunity to take it, is a violation of such section, if the same be done on account of his race, color or previous condition of servitude, but not otherwise.
7. **IDEM.—PENALTY.**—In an action to recover a penalty under Section 2 of the act of Congress aforesaid, it must appear from the complaint, that the plaintiff was a citizen of the United States, and otherwise qualified to vote at the time and place mentioned in the complaint; and that the defendant refused or knowingly omitted to furnish the plaintiff an op-

1870.]

Opinion of the Court—Deady, J.

portunity to become qualified to vote, as by refusing or knowingly omitting to swear the plaintiff to his qualifications as an elector, when the law of the State made it his duty so to do, and that such refusal or omission was on account of the race, color or previous condition of servitude of plaintiff.

Before DEADY, District Judge.

John H. Mitchell and John C. Cartwright, for plaintiff.

James K. Kelly, for defendant.

DEADY J. THIS action was commenced July 1, 1870, to recover a penalty of \$500 under and in pursuance of section 2 of "An Act to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes," approved May 31, 1870. (16 Stat. 140.)

Among other things it is alleged in the complaint that on June 6, 1870, as provided by law, a general election was held in the State of Oregon, and county of Wasco therein, at which a representative in Congress, and also State and county officers, were voted for and elected, and that on said day and long prior thereto, the plaintiff was a citizen of the United States, and a resident of East Dalles in said county and State, and legally entitled to vote at such election in the precinct aforesaid for all such offices. That on said day defendant was acting as judge of election in said precinct, in conjunction with George Corum and Thomas M. Ward, and as such judge was required by law to receive votes from the electors, and perform other duties required by law of such an officer; and that on said day the plaintiff appeared at the polls in said precinct and offered his vote for Joseph G. Wilson, as a representative in Congress, and for Joel Palmer for Governor of Oregon, and for others for different State officers, and for John Darrah for sheriff of said county, and for others for the different county offices; and that "the defendant combining with the other said judges, unlawfully and wrongfully prevented him from voting, that defendant, confederating with said Ward and Corum unlawfully and wilfully refused his vote—refused to swear him to his qualification as an elector—refused to enter his name on the poll books of said precinct, and refused to enter on record

in said book his vote for the different candidates for whom he proferred to vote. All of which duties, though required of him by the laws of Oregon, he, the defendant, wrongfully and wilfully failed and refused to do, though requested to do so by plaintiff—that defendant with said Ward and Corum ordered him away from said polls, and deprived him of his right as a citizen to vote, to his damage. By reason of which unlawful acts of said defendant, so acting and combining with said others, plaintiff has suffered damages; and he, defendant, forfeited and became liable as provided by law to pay said plaintiff therefor the sum of five hundred dollars, for which sum, with costs and allowances as provided by law, plaintiff now asks judgment of the Court.”

On July 8, the defendant demurred to the complaint, and for cause of demurrer alleged:

I. That it did not state facts sufficient to constitute a cause of action.

II. That several causes of action have been improperly united therein.

On August 2 and 3 the demurrer was argued by counsel and submitted.

Duplicity in pleading, or the statement of more than one sufficient matter as a ground of action or defense thereto in the same count or plea, is forbidden by the common law and the Code as tending to useless prolixity and confusion. (1 Chitty's Plead. 259; Gould's Plead. 220, Or. Code 157, 161, 163.) Duplicity in pleading being however only an error in form, at common law the objection had to be made by special demurrer. (Chitty's Plead. 701; Gould's Plead. 466.) The Code having practically abolished special demurrers except in the instances enumerated in Title VIII of Chapter I, has substituted the motion to strike out for the special demurrer in the case of duplicity in pleading. It provides, sec. 103:

“When any pleading contains more than one cause of action or defense, if the same be not pleaded separately, such pleading may, on motion of the adverse party, be stricken out of the case.”

For these reasons, I conclude that as to the second ground

1870.]

Opinion of the Court—Dedy, J.

stated, this demurrer is not well taken and that the objection should have been made by a motion to strike out the complaint.

As this demurrer must be sustained upon the ground that the complaint does not state facts sufficient to constitute a cause of action, it may be well enough to briefly consider the question of duplicity in the complaint, so that the plaintiff, if he desires to amend, may frame his amended complaint accordingly.

The complaint contains but one count or statement of a cause of action, but it is alleged therein that the defendant, in conjunction with the other judges of election, unlawfully and wrongfully prevented the plaintiff from voting for Representative in Congress and for Governor of the State of Oregon, and for other State officers, and for Sheriff of the county, and for other "county offices."

Now, if it was lawful to prevent the plaintiff from voting for any one of the candidates for these several offices, that, it appears to me, is a separate and distinct cause of action, and should have been separately stated. But the complaint alleges, not only that the defendant prevented the plaintiff from voting for a certain candidate for each of these offices, but that the defendant unlawfully and wilfully refused his vote—refused to swear him as to his qualifications as an elector—refused to enter his name on the poll books—refused to enter his vote, etc. Here are four different acts, in addition to the first one stated, alleged to have been committed by the defendant, each of which are assumed by the pleader to be a distinct violation of the act of Congress, and consequently a separate cause of action. If so, they should have been stated or pleaded separately, so as to avoid the prolixity and confusion necessarily resulting from jumbling them together in one count or statement.

It is a question, whether some of these alleged refusals are sufficient to support an action for the penalty given by the act. It does not appear that the penalty given by section two of the act, is given for preventing a person from voting or for refusing to receive or record a vote, but for refusing or knowingly omitting to give full effect to such

section. Now, this section substantially provides, that if the law of the State requires any act to be done as a prerequisite or qualification for voting, and by such law, officers are charged with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote, it shall be the duty of such officers to give to all citizens of the United States an equal opportunity to perform such prerequisite and become qualified to vote, without distinction of race, color or previous condition of servitude.

What amounts to a refusal or wilfull omission to give effect to this section, upon the part of the State officers, depends upon the duties imposed upon these officers in this respect by the law of the State. Upon examination, it does not appear that the section commands these officers to admit or permit citizens of the United States "to vote without distinction of race, color or previous condition of servitude," but to only give such citizens an equal opportunity to become qualified to vote according to the law of the State and to perform any act which the law of the State may require as a prerequisite—a condition precedent—to voting. The duty which this section enjoins upon the officers is something or anything which the State law requires the officer to do, so as to enable the citizen to qualify himself to vote, and from the nature of things, it must precede, in point of time and order, the act of voting, or anything subsequent thereto. If these suggestions be sound, then none of the acts complained of by the complaint are within the purview of the section, except the refusal to swear the plaintiff to his qualifications as an elector.

The law of this State provides (Or. Code, 700) that:

Sec. 13. If any person offering to vote shall be challenged as unqualified, by any judge or clerk of the election, or by any other person entitled to vote at the same poll, the judges shall declare to the person so challenged, the qualifications of an elector; if such person shall then state himself duly qualified, and the challenge shall not be withdrawn, one of the judges shall then tender to him the following oath: You do solemnly swear, etc. (to the effect that

1870.]

Opinion of the Court—Dedy, J.

the affiant had all the qualifications necessary to authorize him to vote at ~~that~~ poll.) And if any person so challenged shall refuse to take such oath so tendered, his vote shall be rejected.

Sec. 14. If any person so offering such vote shall take such oath, his vote shall be received, unless it shall be proven by evidence satisfactory to the majority of the judges that he does not possess the qualifications of an elector, in which case a majority of such judges are authorized to reject such vote.

It seems to me that whenever a person offering a vote is challenged, that it then becomes necessary that he should take this qualifying oath before he can be said to be qualified to vote. By the interposition of the challenge it becomes incumbent upon him to perform this prerequisite, to entitle himself to vote. But he cannot take this oath and perform this prerequisite without the judges shall furnish him an opportunity so to do. Therefore, the law of the State makes it the duty of the judges, or one of them, to tender and administer the oath to him. Then comes the law of Congress and makes it the duty of the judges to give to all citizens, “without distinction of race, color or previous condition of servitude,” the same and equal opportunities to perform this prerequisite—to take this oath—and thereby become qualified to vote. It follows, that a refusal or omission to furnish this equal opportunity to any person seeking to vote, on account of either race, color or previous condition of servitude, is a violation of the act.

As to the first ground of demurrer, I think it well taken. The complaint does not state facts sufficient to constitute a cause of action.

The Act of Congress upon which this action is brought provides for enforcing the amendment to the Constitution which declares:

“Art. 15, Sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State, on account of race, color or previous condition of servitude.

“Sec. 2. Congress shall have power to enforce this article by appropriate legislation.”

The act also regulates the elections of Representatives in Congress, in pursuance of Sec. 4 of Art. 1 of the Constitution, which declares:

“The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing Senators.”

Sections 2, 3 and 4 of the act which relate to the enforcement of the amendment to the Constitution, give penalties, to be recovered by civil action, against persons who violate them, but violations of that portion of the act regulating the election of Representatives in Congress are only punishable by indictment or information.

In considering the sufficiency of the complaint therefore, in this action, no special significance can be given to the fact that the plaintiff offered to vote for a candidate for Representative in Congress.

By the XIV amendment to the Constitution it is declared that:

“Art. XIV. Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” * * * * This clause of this amendment declares who are citizens of the United States and of the several States respectively. The XV amendment above quoted, declares in effect that citizens of the United States and of the several States shall vote in their respective States at all elections by the people, without distinction on account of race, color or previous condition of servitude. But the amendment does not take away the power of the several States to deny the right of citizens of the United States to vote on any other account than those mentioned therein. For instance, notwithstanding the amendment, any State may deny the right of suffrage to citizens of the United States, on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civic duties, crime, etc. The power of Congress in the premises is limited to the scope and object of the amendment. It

1870.]

Opinion of the Court—Deady, J.

can only legislate to enforce the amendment, that is, to secure the right to citizens of the United States to vote in the several States where they reside, without the distinction of race, color or previous condition of servitude. And this appears to be the intention of the act, so far as it relates to the enforcement of the amendment.

Section 1 declares in effect, that all citizens of the United States, being otherwise qualified by law, shall be allowed to vote at all elections by the people in any State, district, etc., without distinction of race, color or previous condition of servitude.

Section 2 declares in effect that officers of the State shall furnish all citizens of the United States with the same and equal opportunities to become qualified to vote without distinction of race, color or previous condition of servitude.

True, the language of sections 4 and 5, particularly the former, if taken literally would apply to acts and proceedings intended to prevent citizens of the United States from voting whether the same were done or carried on, on account of the race, color or previous condition of servitude of the citizen in question or not. But they ought to be construed so as to harmonize with the unambiguous sections which precede them, and must in any view of the matter, be construed so as to have effect only within the limits of the power conferred by the amendment on Congress over the subject.

Upon this construction of the act, to maintain this action I think it would be necessary to prove on the trial:

I. That the plaintiff was a citizen of the United States and otherwise qualified to vote at the time and place mentioned in the complaint.

II. That the defendant refused or knowingly omitted to furnish the plaintiff an opportunity to become qualified to vote, as by refusing or knowingly omitting to swear the plaintiff to his qualifications as an elector, when the law of the State made it his duty so to do, and that such refusal or omission was on account of the race, color, or previous condition of servitude of the plaintiff.

If it be necessary to prove these facts to maintain this

Opinion of the Court—Dedy, J.

[Sept.]

action, they ought to be alleged in the complaint. Now the complaint is silent as to the reason of the defendant's refusal or omission to swear the plaintiff as to his qualifications as an elector. It may have been for some other reason than on account of his race, color, or previous condition of servitude, and then the plaintiff's remedy, if any, would be found under the State law and in the State tribunals. I know it may be said with much probability that disingenuous judges of election who are violently averse to and prejudiced against the amendment and the act, may refuse or omit to allow a citizen to qualify himself to vote, ostensibly for some reason not within the purview of the act, but really and in fact on account of his race, color, or previous condition of servitude. But this is a question of fact, and if the evidence is sufficient the jury will be bound to disregard the pretences of the defendant and find according to what appears to have been the fact. Besides, to prevent a failure of justice on this account, it may be necessary and proper to hold in this class of cases, as in many others, that slight proof on the part of the plaintiff as to the reason of the defendant's refusal or omission, is sufficient to throw the burden of proof in this respect upon the latter. The demurrer must be sustained.

The plaintiff had until the first Monday in November to file an amended complaint upon the payment to the adverse party of \$20. The same order was made in the following cases brought under the same act, and which, by the stipulation of the parties, were to abide the judgment on the demurrer in this, except that the \$20 is to be paid but once: *McKay v. George Corum*; *Same v. Thomas Ward*; *Peter de Lord v. James Farris*; *Same v. Daniel W. Butler*; *Same v. William McAtee*.

THE UNITED STATES *v.* MARIA DE JESUS GARCIA *et al.*,
CLAIMANTS FOR “LOS NOGALES.”

DISTRICT COURT, DISTRICT OF CALIFORNIA,
NOVEMBER 3, 1870.

1. ENTRY ON MINUTES.—FINAL DECREE.—Where the minutes of the former United States District Court for the Southern District of California, showed that the Judge delivered an opinion overruling exceptions and confirming a survey of a Mexican grant, but no decree appeared to have been made or written opinion filed. *Held*, that no final decree had been made and that the cause was still pending.
2. DUTY OF SUCCESSOR TO JUDGE.—*Held*, further, that it was the duty of this court, which had succeeded to the jurisdiction of the late Southern District Court, to enter a decree in the cause; but that on a showing, such as would justify an order for a new trial, or rehearing, or leave to file a bill of review, the cause might be re-examined.

Before HOFFMAN, District Judge.

L. D. Latimer, U. S. Attorney, and *J. W. Harding*, Attorneys for U. S.

Messrs. *Williams & Thornton*, and *Geo. H. Smith*, Attorneys for claimants.

HOFFMAN, J. It appears from the records of the late U. S. District Court, for the Southern District of California, that on the fifteenth November, 1859, the survey of the lands confirmed to the above claimant, was ordered into Court for review.

Exceptions to the survey was duly filed, and on the twenty-fifth May, 1860, an order was entered, by which the exceptions were in part allowed, the survey set aside, and a new survey ordered in conformity to minute and detailed directions embodied in the order.

On the first of June, 1860, this order was opened up on motion of the attorneys for the claimant, and the cause was continued for a further hearing, until the succeeding term. On the nineteenth March, 1861, the cause was again argued and submitted, and on the twentieth March of the same year, an opinion was delivered by the Court “overruling

Opinion of the Court—Hoffman, J.

[Nov.]

the exceptions to the survey, and confirming the said survey of the Surveyor-General of the United States, for the State of California, now on file in this Court.”

No formal order or decree in conformity with this opinion seems to have been entered. But on the fifteenth April following, an appeal was granted on motion of the attorney for the claimants “from the *decision and decree* of the Court, confirming the survey of the Surveyor-General of the United States and overruling the exceptions to the same.”

The District Court for the Southern District of California having been abolished, and its records and pending suits transferred to this Court, a motion is now made to set aside the order last referred to, and to open the case for further proofs, with a view to a rehearing on the merits.

This motion is founded on the record and proofs on file, and on affidavits setting forth facts tending to show the official survey to be grossly erroneous and unjust.

Two questions are thus presented for consideration:

1. Is the decision heretofore rendered, a final judgment or decree, which cannot now, after the lapse of nine years, be considered or disturbed?

2. If not a final decree in form, did the rendering of the decision in open Court and its announcement to the parties constitute such a final adjudication of the cause, as to restrict the authority of the Court at this time to the performance of the merely ministerial act of making and entering a formal decree in conformity with the decision already rendered. Or is the Court at liberty on a showing such as would be regarded as sufficient on a motion for a rehearing, or to sustain a bill of review, to look into the merits, and make such final decree as may be just?

1. The only record of the supposed final judgment of the Court is an entry in the minutes, to the effect that the Judge delivered an opinion overruling the exceptions to the survey, and confirming the survey of the U. S. Surveyor-General, “now on file in this Court.”

No written opinion is found on file, nor any order or decree embodying this decision of the Court. The minutes are not signed by the Judge.

The terms of the entry are not that a judgment was rendered, but only that “*an opinion*” was delivered to the effect stated. There can be no doubt, however, that the Court intended to pronounce its judgment, and virtually to decide the case.

The taking of an appeal at a subsequent day, and before any final decree was signed or entered, is explained by the fact that the idea generally prevailed among the gentlemen of the bar, that all appeals should be taken during the term at which the decision appealed from was rendered, and the appeal in this case was taken out of abundant caution, and to save the rights of the claimants.

The Act of 1860, under which these proceedings took place, evidently contemplates that the determination of a plat and survey the Court, shall be by its “*decree*,” (when the District Court shall *by its decree*, have finally approved said survey and location,” etc. § 5,) and it provides that the said plat and survey so *finally determined by publication or decree* shall have the effect and validity of a patent.

The Act of July 1, 1864, which in effect repealed the Act of 1860, reserves from its operation, cases then pending, and provides, that “the Court may in those cases proceed and complete its examination and determination, and *its decree* thereon shall be subject to appeal to the Circuit Court,” etc. These provisions clearly contemplate something more than the oral announcement in Court, by the Judge, of his opinion or even decision in the case, of which a note or minute is taken by the clerk. The plat and surveys approved by the decree have the effect of a patent. The decree, with the plat annexed, operates, therefore, to convey the title of the United States to the land to the conferee. But to effect this, it would seem indispensable, not only that a formal decree should be made and entered, but that the plat and survey approved should be attached to and made part of it, so that no doubt can remain as to what plat and survey were approved by the Court.

In the former Northern District of this State, it was the variable practice, after the Court had rendered its opinion approving a survey, to make and sign a formal decree, to

which the plat was annexed and of which it was made a part, and which was identified and authenticated by the written approval of the Judge, signed by himself, and inscribed in the margin. It was never supposed that, until this was done, a final decree had been made in the cause.

Substantially, the same practice is understood to have prevailed in the late Court for the Southern District.

Independently, therefore, of the general rules of equity practice in analogous cases, there are special reasons in this class of cases for holding the cause not to be finally adjudicated until a decree with the approved plat and survey attached has been signed and entered.

A question somewhat similar was presented to the Supreme Court in *Silsby et al. v. Foote*, 20 How. R. 290. In that case, a final decision had been made by the Court on the twenty-eighth of August, 1854, and an appeal duly taken on the fourth of September. The decree was special in its terms, and was not settled or signed by the Judge until the eleventh of December, 1856, on which day a second appeal was taken. The question before the Court was, which appeal was regular?

It does not appear from the report in what form the first "final decision" was made—whether by announcement orally by the judge from the bench and noted in the minutes, or by the filing of a written opinion.

The Court held that an appeal might be taken in open Court, during the term and within ten days after the decision is pronounced and entered on the minutes by the clerk. But that an appeal taken within ten days after the decree is settled and signed by the judge and filed by the clerk, would also be in time to stay the proceedings—that when the decree is special there is a propriety in waiting for the settlement before taking the appeal, and that "the time when the judgment or decree may be said to be 'rendered' or 'passed,' admits of some latitude, and may depend somewhat upon the usage and practice of the particular Court."

The Court retained the first appeal and dismissed the second.

In the case of the *United States v. Gomez* (1 Wallace 691),

1870.]

Opinion of the Court—Hoffman, J.

it was contended that the appeal had not been taken within the five years allowed by law. An opinion confirming the claim of Gomez had been delivered on the fifth of June, 1857, and entry thereof duly made on the minutes with an order that a decree be entered up in conformity to the opinion.

On the seventh of January, 1858, a decree was filed, which recited the previous proceedings and was directed to be entered as of the fifth of June, *nunc pro tunc*.

On the fourth of February, 1858, the claimant obtained leave to amend this decree by substituting another, for a larger tract of land, in its stead. A decree in pursuance of this leave was entered on succeeding day.

The appeal was taken on the twenty-fifth day of August, 1862.

On this state of facts, the court says: "Argument can add nothing to the force of this statement as drawn from the record. *Plainly there was no decree of any kind in the case until the seventh of January, 1858, and as that decree was ordered to be amended by substituting another in its stead, the final decree in the case was that of the fifth of February following. Five years therefore had not elapsed before the appeal was taken.*"

It will be noted that in this case it appeared by the minutes that a decree was ordered to be entered in conformity with the opinion at the time when the latter was announced.

In the case at bar, the minutes show that an opinion confirming the survey was delivered, but no order for the entry of a decree in conformity to it, appears to have been made.

This decision of the Supreme Court is therefore conclusive as to the question under consideration. No final decree has ever been entered in the case. It is therefore a pending case within the saving clause of the act of 1854, and must be completed and determined by the entry of a final decree.

2. Is this Court, which is now called upon to enter a final decree, bound by the opinion already delivered, or is it at liberty to examine into the merits, and enter such final decree as may be just?

In the case of (*Dogget v. Emerson*), a cause had by consent been heard in Chambers by the Circuit Judge, a written opinion delivered, and a decree drawn up and given to the reporter, to be filed in the clerk's office; but it did not reach that office until three days after the term had closed.

In the meantime, the Circuit Judge (Mr. J. Story) had died.

At the succeeding term a motion was made to enter and carry into effect the decree.

It was held that the intervening death of the judge was no ground for a rehearing if an opinion was actually delivered; but otherwise, if only prepared. But that an opinion once pronounced or a decree once made may be altered if some obvious mistake of law or of fact be shown. That "there must be something tantamount to what would justify a new trial," and the Court applies to this case the principles which govern in applications for a rehearing, or for leave to file a bill of review, or a bill in the nature of a bill of review. (1 Wood & Min. p. 6.)

In *The Life & Fire Ins. Co. v. Heirs of Wilson* (8 Peters, R. 291), it was held by the Supreme Court that the signing of a "judgment rendered in the case by the judge's predecessor in office, was a ministerial and not a judicial act, and that the judge might be compelled by mandamus to do so, *unless in the exercise of his discretion he grants a new trial*, and that as the successor of his predecessor he can exercise the same powers, and has a right to act on every case that remains undecided on his docket, as fully as his predecessor could have done.

There being no doubt, therefore, as to the power of this Court as the successor of the late District Court for the Southern District of California, to act on the case as fully as that court could have done, it remains to be considered, whether the claimants have shown such a case as entitles them to a rehearing.

In considering this question, I shall confine myself to the undisputed facts disclosed by the record.—Discussion of facts omitted.—REPORTER.

* * * * *

1870.]

Opinion of the Court—Hoffman, J.

The long delay on the part of the claimants to move in the matter is explained, on the ground that they are Mexicans, ignorant of our laws and language. That they have continued to live on the land undisturbed until recently, and relying on the justice of the government to protect them in their undoubted rights, that the Judge who rendered the decision, died shortly afterwards, and the sessions of the Court held by his successor at Los Angeles, were rare and irregular.

It does not appear that any rights of third persons have intervened. Nor is it easy to see how, in any view, such persons would be entitled to protection on the ground of any reliance placed by them on the finality of the supposed decision of the court.

If that decision and the entry on the minutes amounted to a final decree, then the appeal taken from it was regular and the cause remained pending and undetermined until the appeal should be dismissed—which has not been done.

If, on the other hand, the cause is to be deemed not finally decided until a decree has been signed and entered, then the record disclosed that no such decree had ever been made, and that the case was still pending and undecided.

In neither view had third persons the right to treat the supposed decision as final and conclusive.

My opinion is, that it is the duty of the judge of this Court to make such a decree as on full examination of the case shall appear just.

The motion for a re-hearing is therefore granted and the cause will be opened for further proofs.

FREDERICK SOMERVILLE v. THE BRIG "FRANCISCO" &c.

DISTRICT COURT, DISTRICT OF CALIFORNIA,
DECEMBER 1, 1870.

1. UNJUST AND UNEQUAL AGREEMENTS WITH SEAMEN DISREGARDED BY COURT OF ADMIRALTY.—An agreement made between the master and the cook of a fishing vessel by which the latter agreed to renounce his wages, earned and to be earned, and to accept in lieu thereof the *catch* of one of the seamen, pronounced unequal and unjust and to be disregarded by a Court of Admiralty.

Before HOFFMAN, District Judge.

Daniel T. Sullivan, Proctor for libellant.

Milton Andros, Proctor for claimant.

HOFFMAN, J. The libel in this case is filed to recover wages alleged to be due the libellant for services as cook on the above vessel, on her late fishing voyage from this port to the Okhotsh sea.

The shipment of the libellant as cook and the rate of wages agreed to be paid him are not disputed.

The defense set up is, that the libellant was incompetent and negligent. That the crew became discontented with the manner in which he discharged his duties, and demanded of the master that some change should be made. That the master thereupon proposed to the libellant to take the place of one Peterson, a fisherman on board, to relinquish to him the wages already earned by libellant as cook, and to receive in lieu thereof the fish already caught by Peterson, and the same share which Peterson was to receive of the fish, which he, libellant, might subsequently catch during the voyage.

That the libellant agreed to this arrangement, and that there is now due him only a share of the proceeds of the voyage, such as Peterson would have been entitled to. In reply, the libellant alleges that he assented to the captain's proposition through fear and under duress.

By the terms of the articles each of the crew was to

1870.]

Opinion of the Court—Hoffman, J.

receive three tenths of the fish which he might individually catch, subject to certain specified deductions and charges. The vessel sailed on the tenth of April, 1870. The alleged agreement was made on the eighteenth of July. The voyage proved unprofitable. The amount which would be due to the libellant under the alleged agreement is an inconsiderable sum, far less than the amount of his wages.

The allegations of the answer, and the proofs offered at the hearing, leave it somewhat uncertain whether the defense relied on is the incompetence and neglect of the libellant, and the consequent right of the master to withhold his wages in whole or in part, or a voluntary renunciation by him of his contract as cook, and the acceptance of a new employment on the same terms and conditions as those on which Peterson had contracted.

There can be no doubt that whenever an officer or mariner proves incompetent to discharge the duties he has contracted to perform, the master may degrade him, and the amount of his compensation will be determined not by the contract but by the value of the services he has actually rendered.

But, in this case the proofs of incompetence or negligence on the part of the libellant are wholly insufficient.

Some dissatisfaction was manifested by the crew at Honolulu, but this seems to have been on account of the quantity rather than the quality or mode of cooking the food supplied them. If the latter was the case, it is by no means clear that it was occasioned by the fault of the cook. The captain himself appears to have assured the men that the libellant was a good cook, but offered to procure another if one could be had, provided the men would pay the three months extra wages required to be deposited on the discharge of a seaman in a foreign port. This the men declined to do, and the vessel proceeded on her voyage. On the eighteenth of July, some time after the vessel had arrived on the fishing grounds, the men were not furnished coffee as was usual when first called out in the morning, and no breakfast was prepared at the customary hour. They thereupon proceeded aft in a body, and informed the mas-

ter that they could not and would not work unless their coffee was served to them and their breakfast prepared. The master then called the cook, or went to the galley and spoke to him, as the latter alleges, in a very violent and threatening manner. The excuse given by the cook was that the breakfast had been overturned by the heavy rolling of the ship, and that one of his hands was so sore from the effects of a splinter as to deprive him of its use.

Shortly afterwards the cook was called into the cabin, and the arrangement to take Peterson's place was entered into. It is proved that the ship was rolling very heavily, and that some of the dishes or pans on the stove were capsized.

It is also proved that the cook's hand was and had for some days been sore and festered, so as greatly to interfere with the performance of his duties.

None of the crew who were examined allege any incompetence on the part of the cook. Some of them testify to his great desire to get through his work, and to his depriving himself of sleep for many consecutive hours. The coal on board also appears to have been nearly or quite unfit for use, and the drift wood used as fuel was wet and difficult to kindle. It was, moreover, necessary to saw or split it, which the cook, with a sore hand, found very difficult.

This, and the incident at Honolulu, are the only instances of alleged neglect mentioned by the witnesses. The master states, however, that almost every week during the voyage from here to the Ochotsk sea he was obliged to speak to the cook about not giving the men enough, and that the crew were continually grumbling. But the men who were examined as witnesses make no serious complaints of an insufficient supply of food by the cook's fault. Some of them seem to consider that there was as much reason for dissatisfaction after as before the substitution of Peterson as cook in place of the libellant.

In view of all the testimony, I cannot consider that the incompetence or negligence of the libellant was such as to justify the master in disrating him, rescinding the contract, and depriving him of the opportunity of earning the wages agreed to be given him.

1870.]

Opinion of the Court—Hoffman, J.

It need scarcely be observed that if the condition of his hand prevented him either wholly or partially from performing his duties, that circumstance affords no reason either for disrating him or denying him wages. A seaman disabled without his own fault, in the service of the ship, is entitled to be cured at the expense of the latter, and this without diminution of his wages.

The libellant, then, is entitled to recover, unless, by a voluntary and fair agreement, he has renounced his right to his wages earned and to be earned, and has entered into a new contract.

The Courts of maritime law, mindful of the ignorance, the credulity, and the thoughtlessness of seamen, "have been in the constant habit," says Mr. I. Story, "of extending towards them a peculiar protecting favor and guardianship. They are emphatically the wards of the admiralty, and, though not technically incapable of entering into a valid contract, they are treated in the same manner as Courts of Equity are accustomed to treat young heirs dealing with their expectancies, wards with their guardians, and *cestuis que trust* with their trustees. * * * As they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract in which they engage. If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side not compensated by extraordinary benefits on the other side, the judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the weaker party, and that *pro tanto* the bargain ought to be set aside as unjust and unreasonable." (*Hardin v. Gordon*, 2 Mass. 557.)

In the celebrated judgment of Lord Stowell in the *Juliana* (2 Dod's Adm. R. 504), the same principles were declared and vindicated. In that case it was held that where a voyage was divided by various ports of delivery, a proportional claim for wages attached at each of such ports, and that all attempts to evade or invade this right of the seamen by renunciations obtained from them without any consideration

by collateral bonds, or by contracts inserted in the body of the articles, were ineffectual and void.

To the same effect are numerous American authorities. (3 Kent's Comm. 194, and cases cited; 1 Sprague, Dec. 584, 279, 107, 199; 1 Peters. Adm. D. 187 note.) Thus, it has been held that a stipulation in the articles to pay for all medicines and medical aid further than the medical chest afforded, was void as being grossly inequitable (*Harden v. Gorden, ubi sup.*), and generally, that though the articles are conclusive as to the wages and voyage, yet, on all collateral points, the Court of Admiralty will consider how far the stipulations are equitable and just. (2 Hagg. 394.) If the seaman contracting on shore and before the commencement of the voyage, is considered "as placed under the influence of men who have naturally acquired a mastery over him," by how much more must the seaman making an agreement with the master at sea, and subject to his absolute and arbitrary authority, be deemed to be acting under an undue and almost irresistible influence. To avoid a contract made under such circumstances, it is not necessary to show duress or compulsion. It is sufficient if it appear to be unequal and injurious to the weaker party. If it be unjust, it will be deemed to have been obtained by oppression or fraud. "No man," says Lord Stowell, "willingly submits to injustice knowing it to be such; and if he does submit to injustice it is upon advantage taken of his ignorance, or his weakness, or, in other words, by oppression or fraud." (The *Juliana*, 2 Dods. 516.)

What, then, are the circumstances of this case?

An accident, coupled with a partial inability to work, owing to the condition of his hand, had prevented the libellant from preparing breakfast for the crew. The latter had complained in a body to the master. The master had harshly rebuked the libellant, and had threatened, as he says (and his testimony on this point is corroborated by that of other witnesses), to confine him and his son under the forecastle for the remainder of the voyage. Very shortly afterwards, and before there was time for his natural excitement and alarm to subside, he was summoned to the cabin,

1870.]

Opinion of the Court—Hoffman, J.

and, in the presence of the two mates, the master proposes to him to renounce his rights under his contract, and to enter into a new one. He states that he objected, on the ground that he was no fisherman, and that his hand was too sore to permit him to fish. The master replied that his hand would soon be well. Not daring, as he says, further to oppose the master's will, he assented to the new agreement.

The libellant is an old man, and evidently not fitted to offer a determined resistance to oppression, or make a vigorous assertion of his rights. Few cases can be imagined short of actual or threatened violence where the parties to an agreement would stand upon more unequal grounds. On the one side authority and absolute power to compel obedience. On the other old age, weakness, and entire dependence.

Was then the agreement thus entered into in all respects fair and just to the libellant? If it was not, it is clearly void. By it he renounced three months' wages at \$40 per month, already earned, together with all future earnings during the voyage. For this he received Peterson's share of the fish already caught by him, and was to receive a similar share of the fish he himself might thereafter take. It is doubtful whether he was exactly informed as to the number of fish which had, up to that time, been taken by Peterson, but it is quite clear that he had little idea either of the share which Peterson was to receive or what deductions were to be made and charges allowed on the settlement of the voyage. His hand was so sore as to disable him from work. It continued in nearly the same condition up to the end of the voyage.

In fact the number of fish caught by him was insignificant. On the final settlement of the voyage little or nothing was found due him under the new contract. He had no experience in or knowledge of fishing. The new duties he was required to undertake bore no analogy to the service he had contracted to perform.

Under these circumstances, can it be believed that the libellant voluntarily assented to the new agreement into

which he entered? Or, if he did, can it be pronounced so fair, equal and just, that a Court of Admiralty should sustain and enforce it? To these questions, and especially to the last, a negative answer must be given.

But, in coming to this conclusion, I do not desire to be understood to impute to the master any wilful design to oppress or defraud the libellant.

He was probably somewhat dissatisfied with his performance of his duties. He knew that the condition of his hand disabled him from fully discharging them, and he probably felt at liberty to propose, perhaps to insist upon, an arrangement which would throw the consequences of that disability on the libellant, and not on the ship.

He perhaps forgot that the disability of the libellant even though it had been total, yet incurred, as it was without his fault and while in the service of the ship in no respect impaired his right to his wages. That the expense of procuring a substitute was an expense to be borne by the ship, and neither directly or indirectly to be thrown upon the libellant; and that he had no right, in the relation he bore to him, to propose, still less to insist upon an unequal and injurious bargain of which the almost certain operation was to deprive the libellant of his wages for the entire voyage. For he must have known that three tenths of any fish the libellant might thereafter catch could not, after deducting the stipulated charges, by any possibility be equivalent to the monthly wages he renounced.

A decree must be entered in favor of the libellant for the amount of his wages for voyage, deducting his advance and the bill for articles furnished, produced by the master.

1870.]

Opinion of the Court—Hoffman, J.

In re RUSSELL STEVENS IN BANKRUPTCY.DISTRICT COURT, DISTRICT OF CALIFORNIA,
DECEMBER 27, 1870.

1. SURVIVING PARTNER ADJUDGED BANKRUPT.—A surviving partner will be adjudged bankrupt on an act of bankruptcy committed by him in the course of the administration of the assets of the dissolved partnership, notwithstanding that the separate estate of the deceased partner is sufficient to pay all his debts, joint and separate.
2. JOINT ASSETS TO BE TAKEN POSSESSION OF.—The messenger will in such case take possession of the joint assets in the hands of the bankrupt surviving partner, and also of his separate property.

Before HOFFMAN, District Judge.

Messrs. H. L. Joachimsen & R. W. Hent, attorneys for petitioning creditor.

M. A. Wheaton, attorney for bankrupts.

HOFFMAN, J. The petition in this case is filed by a creditor of the late firm of Stevens & ———, charging an act of bankruptcy committed by Stevens as surviving partner of the firm, and praying that he be adjudged bankrupt as an individual, and as such surviving partner, and that a warrant issue against his separate property, and the joint assets in his hands, as such surviving partner.

To this petition objections in the nature of a demurrer have been interposed.

It is urged that the Court has no authority to administer upon the joint assets, unless the firm be declared bankrupt, and that this cannot be done because it has been dissolved by the death of one of the partners, and because it is admitted that the estate of the deceased partner is amply sufficient to satisfy all of his debts, both individual and joint.

It is also urged that a bankrupt cannot be discharged from partnership debts, unless the other partners are brought in and the firm adjudged bankrupt, and that inasmuch as the alleged act of bankruptcy was committed in respect

of a partnership debt, and the petitioning creditor is a creditor of the firm, the surviving partner cannot be adjudged a bankrupt in his individual capacity.

It has been held in several cases by the learned judge of the southern district of New York, that when there are firm debts and firm assets the firm must be declared bankrupt by either voluntary or involuntary proceedings, before any member of it can be discharged from his liabilities; but that this applies only to actually existing partnerships or to cases where there are firm assets, and not to co-partnerships terminated theretofore by bankruptcy, insolvency, assignment or otherwise. *In re Daniel Warkens*, 2 B. R. 113; *In re Frear*, 1 B. R. 201; *In re Settle*, 1 B. R. 74; *In re Shepard*, 3 B. R. 43.

I have not been able to understand the precise grounds on which these decisions are based. Undoubtedly, where the firm of which the petitioner is a member is bankrupt, there should be an adjudication in bankruptcy against the partners composing it, and an assignee appointed in that proceeding before the partnership assets can be reached. But cases often occur where a partner may be bankrupt while the remaining parties, as individuals, and even the firm itself, are entirely solvent. In such case no adjudication against the firm could be made. But the bankrupt partner would, nevertheless, have an unquestionable right to be discharged from all his debts provable under the act. (See opinion of Mr. Reg. Fitch, 1 B. R. 202.)

But if on his petition setting forth firm debts and firm assets, no adjudication can be made until the remaining partners are brought in, he will be deprived of the benefit of the act. For the partners being solvent no adjudication can be made against them or the firm.

The Bankrupt Act clearly contemplates that one partner may be discharged from his joint, as well as several debts, without impairing the liability of his co-partners.

Section 33 provides that no discharge granted under this act shall release, discharge or affect any persons liable for the same debt, for or with the bankrupt, either as partner, "joint contractor, endorser, surety or otherwise," and such

1870.]

Opinion of the Court—Hoffman, J.

would no doubt be the law independently of this provision. (1 Gray, 623; 5 Cush. 613.)

The case, therefore, provided for by the statute, is evidently one where one partner becomes bankrupt while the others remain solvent, and it is their liability which it is intended to preserve.

In the case at bar no proceedings can be taken under the thirty-sixth section and general order, No. 18. The partnership has ceased to exist, having been dissolved by the death of one of its members.

It is not insolvent, for it is admitted that the deceased partner's estate is sufficient to satisfy all his debts, joint and separate. Nor, if it were otherwise, are there any means of bringing in his executors, or of taking possession of his separate estate, which is in the course of administration in the Probate Court.

But all the joint assets are in the hands of the surviving partner, who holds the same for all purposes of administration until the debts are paid. The debts due the partnership must be collected in his name, and he alone can be sued by the firm creditors.

If, then, while clothed with these rights and charged with these duties, he commits an act of bankruptcy, I see no reason why the creditors cannot invoke the aid of a Court of Bankruptcy, to take out of his hands the joint assets, as well as his separate estate, and distribute them among the creditors. If, in respect to his separate estate, he had made a fraudulent assignment, given a preference, or suffered his commercial paper to be dishonored, there can be no doubt that he could be adjudged a bankrupt as an individual. It would be a strange anomaly if on such an adjudication, where the debts owed by him as a partner are his own debts, as much as those contracted by him separately, and where the firm assets in his possession are his own property, to the extent of his interest in the firm, that the Court should have no power to take possession of the joint assets, but must leave them in his hands, to be disposed of in fraud and absolute defiance of the provisions of the Bankrupt Act.

Under the Massachusetts Insolvent law, on which it is based, no doubt seems to have been entertained as to the right of a surviving partner to institute proceedings in bankruptcy, which will include the estate of the firm. (*Adams Bank v. Rice*, 2 Allen, 480).

In (*Durgin v. Coolidge*, 3 Allen, 554), the court says:

“ The surviving partner is entitled to have possession of all the partnership property. During the life time of the partners either of them might make application to the court of insolvency upon which legal proceedings might be instituted and pursued against the estate of the partners. It is therefore quite clear that upon the death of one of the partners the survivor may rightfully apply to the Court of Insolvency, by petition, and that thereupon the proceedings may be had for the sequestration of the partnership property and the payment of the debts due to the partnership creditors.”

But the warrant will not authorize the seizure of the separate estate of the deceased partner.

If this proceeding can be taken by the surviving partner, it necessarily follows that when he has committed an act of bankruptcy, the same proceedings can be taken against him by either a joint or separate creditor.

The apprehension expressed by counsel, that the discharge of the surviving partner might operate to release the estate of the deceased partner from liability seems entirely groundless.

Such a result would be in direct contravention of the provisions of the 33d section of the act. Nor could the terms of the discharge bear any such interpretation. For the decree would merely declare that Russell Stevens was discharged from all his debts provable under the act.

Some question was made at the hearings as to whether the act charged in the petition was an act of bankruptcy under the law.

It appears that the firm had been engaged in the business of manufacturing lumber. The surviving partner gave to a creditor of the firm a draft or bill of exchange on its agents, which, on presentment, was dishonored and remained unpaid

1870]

Syllabus.

for more than fourteen days. The draft was undoubtedly "commercial paper" within the meaning of the law. It was paper governed by the rules which are founded on the custom of merchants. (*In re Chandler*, 4 B. R. p. 66.)

Nor do I think that the circumstance that the manufacturing firm had been dissolved by the death of the partner, and that the survivor was engaged in settling its affairs and closing up the business, divested the latter of his character of manufacturer, especially when the debt which formed the consideration of the draft was a debt contracted by the firm in the course of its manufacturing business.

It was stipulated on the hearing that if the Court should be of opinion that the objections raised by the demurrer were untenable, an adjudication should be entered without a reference to the register to ascertain the facts.

The adjudication will therefore be made, and the warrant will direct the messenger to seize the separate estate as well as the estate of the firm in the hands of the bankrupt.

MARTHA CHAPPELLE v. CYRUS OLNEY.

CIRCUIT COURT, DISTRICT OF OREGON,
DECEMBER 31, 1870.

1. **LIMITATION DURING TIME OF INSURRECTION.**—From and after the act of July 13, 1861 (12 Stat. 257), and the proclamation of August 16, 1861 (*Id.* 1262), pursuant thereto, declaring the inhabitants of Arkansas to be in a state of insurrection against the United States, and until the termination of such insurrection, an inhabitant of Arkansas could not maintain an action in the Courts within the State of Oregon against an inhabitant of the latter State, and therefore the period during which such insurrection existed is not to be counted as a part of the time limited for the commencement of such an action.
2. **AUTHORITY OF PRESIDENT TO DECLARE THAT INSURRECTION HAD CEASED.**—The act of July 13, 1861, impliedly authorized the President, so long as Congress did not otherwise provide, to declare by proclamation that the insurrection before declared to exist by him, had ceased, as to the inhabitants of any State or section thereof.
3. **EXCEPTIONS TO STATE OF INSURRECTION IN ARKANSAS.**—The President having declared the inhabitants of Arkansas in a state of insurrection, the Court

Opinion of the Court — Deady, J.

[Dec.]

does not judicially know that any portion of them, then or afterwards, were within the exceptions in the proclamation because they in fact maintained a loyal adhesion to the Union, or inhabited a portion of the State occupied and controlled by the forces of the United States.

4. **RIGHT OF ACTION NOT TO SURVIVE TO WIFE.**—A chose in action accruing to a woman during coverture survives to her, unless the husband reduce it to his exclusive possession during his life time; therefore, when a legacy was given to the wife, and she and her husband joined in a power of attorney authorizing O. to collect and receive the same for her use and benefit, the receipt of the money by O. during the life of the husband was not the possession of the latter, except for the use of the wife, and the right to recover the same from O. survived to her.
5. **INTEREST DURING STATE OF INSURRECTION.**—Interest is not recoverable upon a debt owing by an inhabitant of Oregon to an inhabitant of Arkansas during the period the inhabitants of the latter State were in a state of insurrection against the United States.

Before DEADY, District Judge.

E. C. Bronaugh, for plaintiff.

W. Lair Hill, for defendant.

DEADY, J. This action was commenced August 17, 1870. From the complaint it appears that the plaintiff is a resident and citizen of the State of Arkansas and the defendant of Oregon, and that the plaintiff has resided in Cross county, in the State of Arkansas, continuously since December 10, 1859.

That in the year 1854, the plaintiff, then being one of the legatees in the last will and testament of Philip Thompson, deceased, late of Oregon, did, together with her late husband, Elisha W. Chappelle, constitute and appoint the defendant their agent and attorney to collect and receive for plaintiff's use and benefit, all sums of money accruing to plaintiff from the estate of said Thompson, and to hold the same subject to the order and demand of plaintiff and her said husband; in consideration whereof, the defendant undertook and promised plaintiff and her said husband to transmit to said husband for the use and benefit of plaintiff all such sums of money received by him as aforesaid, whenever he should be thereunto afterwards requested. That the defendant as agent and attorney as aforesaid received from said estate for plaintiff's use the sum total of \$6,146

1870.]

Opinion of the Court—Deady, J.

in gold and silver coin; and that on November 30, 1860, the sum of \$4,950.54 of said moneys was remaining in the hands of defendant; and that upon said last mentioned date, said Elisha W. Chappelle requested defendant to forthwith transmit to him for plaintiff's use and benefit all such moneys then in his hands; and that the defendant neglected and refused to transmit or pay over the sum of money then in his hands or any part thereof, and still so neglects and refuses, to the damage of plaintiff \$9,756.71.

On August 17, the defendant appeared and demurred to the complaint, and for cause of demurrer alleged:

1. That the action had not been commenced within the time limited by law.

2. That the facts stated are not sufficient to constitute a cause of action.

On September 5 and 13 the demurrer was argued by counsel and submitted.

It appears from the complaint that the plaintiff's right of action did not accrue within six years next before the commencement of this action, but that a period of 9 years, 8 months and 17 days elapsed between the demand for the money and the bringing of the action. By the law of this State such an action as this is barred if not commenced within six years; but when the plaintiff is "an alien, subject or a citizen of a country at war with the United States, the time of the continuance of the war shall not be a part of the time limited for the commencement of the action." (Or. Code, 141, 144.) It follows that the demurrer as to the first cause alleged is well taken, unless the plaintiff's right to sue the defendant was suspended at least 3 years, 8 months and 17 days by reason of the hostilities or war carried on between the United States and the States of the so-called Southern Confederacy—including Arkansas—between November 30, 1860, and the commencement of this action. If the right to sue was so suspended for any length of time, that period is not to be counted as a part of the six years within which the action may have been commenced.

By section 5 of the act of July 13, 1861 (12 *Stat.* 257), Congress authorized the President, under certain circum-

stances therein mentioned, to declare by proclamation that the inhabitants of any State or section thereof were in a state of insurrection against the United States; “and thereupon all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from said State or section into the other parts of the United States, and all proceeding to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States.”

This act was passed with direct reference to the rebellion or insurrection then being organized and maintained in certain States—including Arkansas—against the authority and Government of the United States. In pursuance of this act the President on August 16, 1861 (12 *Stat.* 1262), by proclamation, declared the inhabitants of certain States—including Arkansas—to be in a state of insurrection against the United States, excepting, among others, the inhabitants of such parts of such States as “may maintain a loyal adhesion to the Constitution and the Union, or may be, from time to time, occupied and controlled by forces of the United States engaged in the dispersion of said insurgents.”

On April 2, 1868, the President by proclamation declared “that the insurrection which heretofore existed in certain States—including Arkansas—is at an end;” and on August 20, 1866, another presidential proclamation was issued declaring that the insurrection was at an end in Texas—this State not having been included in the proclamation last mentioned—and that the “said insurrection is at an end, and that peace, order, tranquillity and civil authority now exist in and throughout the whole of the United States of America.”

From and after the date of the proclamation of August 16, 1861, all commercial intercourse was prohibited between the inhabitants of Arkansas and the people of the United States, and the transportation and removal of property to or from Arkansas to other parts of the United States not declared

1870.]

Opinion of the Court—Dedy, J.

to be in a state of insurrection, was punishable by forfeiture thereof. For the time being the plaintiff was a citizen or inhabitant of a country at war with the United States, and therefore could not maintain an action in the Courts within this State against the defendant to secure this money. (1 *Kent. Com.* 66.) The plaintiff's remedy was suspended until the cessation of hostilities and the restoration of peace and lawful intercourse between the people of the two countries. (*Id.* 68.)

The next question to be considered is, when did this state of insurrection or hostilities cease? Without stopping to consider whether the President has any power to declare the beginning or ending of an insurrection, except in pursuance of legislative authority, and conceding that all power over questions of war and peace, domestic or foreign, is vested by the Constitution in Congress, except that vested in the treaty making power, I am of the opinion that the authority conferred upon the Executive by the act of July 13, 1861, to declare Arkansas in a state of insurrection, impliedly authorized him, if the state of things amounting to such insurrection should cease or change, to then declare it at an end, unless in the mean time Congress had otherwise provided. Assuming that the insurrection, as to Arkansas, was at an end from and after the proclamation of April 2, 1866, the remedy of the plaintiff—the right to sue defendant for this money—was suspended for four years, seven months and sixteen days. Deducting this period from the time between the accruing of the right of action and the commencement of this action, leaves five years, one month and one day—a period of eleven months and twenty-nine days less than that allowed by law within which to begin the action. This view of the matter is the most favorable one that can be taken for the defendant, for there is no ground upon which the Court can assume that the insurrection, including the prohibition of intercourse between the people of the United States and Arkansas, terminated at an earlier date. Actual war—the marching of hostile forces and the conflict of opposing armies in battle—may have ceased sooner, but this proclamation is the earliest act of the gov-

ernment to which the attention of the Court has been called which purports or has the effect to relieve the inhabitants of Arkansas from the status of insurrection and consequent non-intercourse, in which they were placed by the proclamation of August 16, 1861.

In *United States v. Anderson* (9 Wal. 56), the question arose, when was the rebellion *entirely* suppressed? The circumstances were these: What is called the Captured and Abandoned Property Act, passed March 12, 1863 (12 Stat. 820), gave to the loyal owners of such property a right to bring suit against the United States in the Court of Claims to recover the proceeds thereof, “*at any time within two years after the suppression of the rebellion.*” Anderson, a resident of Charleston, South Carolina, on June 5, 1868, commenced an action to recover the proceeds of certain cotton seized and sold by the United States. The defense was, that the action was barred by the limitation in the act of March 12, 1863, or in other words, that the action was not commenced “*within two years after the suppression of the rebellion.*” By an act of Congress passed March 2, 1867 (13 Stat. 422), it was declared that the act passed June 20, 1864 (13 Stat. 144), to increase the pay of the army should “*be continued in full force and effect for three years after the close of the rebellion as announced by the President of the United States, by proclamation bearing date August 20, 1866.*”

The Court held that the limitation of two years did not commence to run until the rebellion was suppressed throughout the whole country, and that the proclamation of August 20, 1866, was the first official declaration on the part of the Executive that the rebellion was wholly suppressed. The Court also held that the act of March 2, 1867, was so far a legislative recognition of the proclamation declaring the insurrection at an end throughout the United States on August 20, 1866, and that that day would be considered as the day when the rebellion was suppressed, as respects the rights intended to be secured by the Captured and Abandoned Property Act.

The Court also expressed the opinion that there is no reason why this declaration of Congress should not be re-

1870.]

Opinion of the Court—Dedy, J.

ceived as settling the question of when the rebellion was suppressed, “wherever private rights are effected by it.” But the Court premised this dictum by the declaration that it did not intend to decide anything more than the question: When was the rebellion entirely suppressed within the meaning of the limitation clause on the Captured and Abandoned Property Act?

The conclusion of the Supreme Court upon this question does not conflict with the opinion already expressed in this case, that for the purpose of enabling an inhabitant of Arkansas to maintain an action in the Courts of Oregon, the insurrection and consequent disability of the plaintiff to sue were at an end, from and after the proclamation to that effect of April 2, 1866. For this purpose it was only necessary that the insurrection should have been declared at an end as to the inhabitants of Arkansas, and whether it still continued in Texas or not, did not affect the plaintiff’s right to sue the defendant.

But as to this case, it makes no difference whether the insurrection as to the inhabitants of Arkansas, was at an end from and after the proclamation of April 2, 1866, or that of August 20, of the same year. In either case, after deducting the time during which the remedy of the plaintiff was suspended by the state of war or insurrection, the limitation of six years would not have run against her right of action.

On the argument counsel for defendant did not seriously question the correctness of these conclusions, but maintained that the action was barred unless it affirmatively appeared from the complaint that the plaintiff was not within the exception contained in the proclamation of August 16, 1861, or in other words, that the particular locality in Arkansas—Cross county—in which the plaintiff resided during the existence of the insurrection did not “maintain a loyal adhesion to the Union and the Constitution,” or was not “occupied and controlled by forces of the United States.”

The plaintiff is not required to anticipate the defense of the statute of limitations, nor could the defendant at com-

Opinion of the Court—Deady, J.

[Dec.]

mon law claim the benefit of it unless he pleaded it. But under the Code, when it appears from the statement of the cause of action in the complaint, that it did not accrue within the limitation prescribed by law, the defense may be made by demurrer. In such case I suppose the plaintiff should anticipate the defense by stating in the complaint any special matter which he relies upon to take the case out of the statute, or otherwise the demurrer will be sustained. But, as in this case, if such special matter is within the judicial knowledge of the Court, it need not be stated in the complaint.

Here it appears upon the face of the complaint that the action was not commenced within six years from the time it accrued. If this were all, a demurrer that the action had not been commenced within the time limited would be a good defense. But it is also judicially known to the court that the inhabitants of Arkansas—which description includes the plaintiff under the allegations in the pleadings—were in a state of insurrection against the United States for a sufficient period after the action accrued to take the case out of the statute. But at this point the defendant asks the court to assume that Cross county was during this time within the exception in the proclamation,—that is, was either loyal to the Union or occupied by the forces of the United States, and therefore not in a state of insurrection. Now this is a matter of which, if true, the court cannot take judicial notice. The proclamation declares the whole State to be in a state of insurrection. No particular exceptions to this condition are recognized as then existing. The exceptions made, relate to no particular person or place, but only to such persons or places as may possibly then or thereafter—particularly thereafter—“maintain a loyal adhesion to the Union and Constitution,” or be “occupied and controlled by the forces of the United States.” The exception in regard to the State of Virginia is positive and definite. It relates to the “inhabitants of that part of the State lying west of the Alleghany mountains.” If then the particular portion of Arkansas in which the plaintiff resided during the hostilities between the United States

1870.]

Opinion of the Court—Dedy, J.

and the Southern Confederacy was, as a matter of fact, loyal to the Union or occupied and controlled by United States forces, and therefore not in a state of insurrection, and the defendant relies upon these facts to bring the case within the bar of the statute, he should plead them and be prepared to prove them on the trial.

Upon the argument of the second cause of demurrer it was contended for the defendant that the chose in action—the legacy—was reduced to possession by the husband of plaintiff in his lifetime, and therefore the right to the same did not survive to her, but to the administrator of the husband.

Upon a careful examination of the facts and authorities I am clear that the demurrer in this respect is not well taken.

The husband was entitled to reduce this legacy to his possession in his lifetime, and then the property in it would have become absolutely his, and upon his decease gone to his administrator. But if he did not so reduce it to possession, his property in it being in the meantime only conditional, it would survive to his wife. (1 Bac. Ab. 700; *Hayward v. Hayward*, 20 Pick. 520; *Schuyler et al. v. Hoyle*, 5 John. Ch. 196.)

In *Hayward v. Hayward*, and *Schuyler et al. v. Hoyle*, *supra*, the questions raised by this branch of the demurrer are thoroughly examined and discussed, and the decisions of both the learned courts were in favor of the right of survivorship of the wife, and that, too, under circumstances not so strongly in her favor as are those of this case.

If the power of attorney given to defendant had been given by the husband alone, as it might have been, there would be force in the argument that the act itself evinced an intention to reduce the property to his own possession. But the power was from the wife as well as the husband. This fact itself shows a want of intention on the part of the husband to acquire the property for himself; and the possession of the defendant acquired under this joint power of attorney was not the separate possession of the husband, but of him and his wife.

It is well settled that if the husband sues alone, as he may, for money to which he is entitled in right of his wife,

On December 16, 1870, S. answered the petition, denying that he sold his property or made the payment to W. & Co. with the intent in the petition alleged.

On the same day, the petitioner filed a motion for judgment on the pleadings, upon the ground that the answer of S. in fact admits the acts of bankruptcy charged in the petition; and on December 28, the motion was argued and submitted.

Upon the argument, counsel for the debtor confidently asserted that Congress had no power to pass a bankrupt law applicable to other persons than traders, and that an insolvent person had a natural right to dispose of his effects as he chose, and by such disposition to prefer one creditor to another. Counsel cites no authority to support the objection to the constitutionality of the act, but maintained generally that the power of Congress in the premises was limited to the passing of such bankrupt acts as were in force in England at the time of the formation and adoption of the constitution, and that these did not apply to any one except traders.

The constitution (Art. 1, § 8) provides: "The Congress shall have power—To establish * * * uniform laws on the subject of bankruptcies throughout the United States."

If language means anything, this is something more than the power to re-enact the particular bankrupt act then in force in Great Britain. It is a grant of plenary power over the "subject of bankruptcies." Now the subject of bankruptcies includes the distribution of the property of the fraudulent or insolvent debtor among his creditors and the discharge of such debtor from his contracts and legal liabilities, as well as all the intermediate and incidental matters tending to the accomplishment or promotion of these two principal ends. Congress is given full power over this subject, with the one qualification, that its laws thereon shall be uniform throughout the United States. Whether these laws shall apply to all fraudulent or insolvent debtors, or only to such as are engaged in trade, is committed by the constitution to the wisdom and discretion of the law-making power. This may be illustrated by reference to the clause in the

1871.]

Opinion of the Court—Dedy, J.

section above quoted, whereby the Constitution gives Congress power—

“To establish post offices and post roads.”

Is this to be considered a plenary grant of power over the subject of the collection, conveyance and delivery of all such letters, newspapers and other things as in the progress of society it may be found useful and convenient to transmit from place to place by public post, or does it merely authorize Congress to establish and maintain such a meagre and primitive postal system as was then established in Great Britain by act of Parliament? It seems to me it is only necessary to state the latter conclusion or proposition to show its absurdity.

If the power to establish post offices and roads, is not full power over the subject, to be exercised from time to time according to the varying demands and necessities of society, then it is clear upon the argument against the Bankrupt Act, that carrying the mail by steam, carrying it by railway, transmitting books through it and dispatching it daily are all unconstitutional, for the system in force in England at the adoption of the Constitution, provided for none of these things.

In *re Klein*, decided in the Circuit Court for the District of Missouri, and reported in 1 How. 277, Mr. Justice Catron held the Bankrupt Act of 1841, which was not restricted to traders, to be constitutional. In that case the objection to the act was two fold—First: That it allowed the debtor to avail himself of the benefit of the act upon his own petition; and Second: That it was not restricted to traders, contrary in both particulars to the provisions of the English act. In considering these objections, the learned Judge said:

“If the power conferred on Congress, carries with it these restrictions, then the District Court properly refused to discharge the applicant Klein, because the act of Congress was unconstitutional in his case. But other and controlling considerations enter into the construction of the power; it is general and unlimited; it gives the unrestricted authority to Congress over the whole subject as the Parliament of Great Britain had it; and as the sovereign States

of this Union had it before the time when the Constitution was adopted. * * *

“The District Court relied confidently on the ground, that Congress can pass no law violating contracts; and that the clause of the Constitution conferred no such authority, because the English bankrupt laws by which the power is supposed to be restricted, only permitted the contract to be annulled at the election of four parts in five of the creditors in number and value; and therefore they annulled it by a new contract. This argument proceeds on the assumption, that a proceeding in bankruptcy can only be had, at the election of, and for the benefit of creditors; and that every material step is their joint act; to which the debtor is compelled to submit. For the present it will only be necessary to say, that one prominent reason why the power is given to Congress, was to secure to the people of the United States, as one people, a uniform law, by which a debtor might be discharged from the obligation of his contracts and his future acquisitions exempted from his previous engagements; that the rights of debtor and creditor, equally entered into the minds of the framers of the Constitution. The great object was to deprive the States of the dangerous power to abolish debts. Few provisions in the Constitution have had more beneficial consequences than this; and the kindred inhibition on the States, that they should pass no law impairing the obligations of contracts.

“The inhabitants of States producing largely, must be creditors; the inhabitants of those that are consumers, will be debtors; bankrupt laws of the latter States might ruin the producers and creditors: they having no interest or power in the government of the consuming States, and it being the interest of the latter to annul the debts of non-residents, no remedy would exist for the grossest oppression. No laws of relief would be more effectual in time of pressure by foreign creditors; nor more likely to be adopted. If one State adopted such a measure, it would furnish a fair occasion for others to do the same, on the plausible pretext of self defense; others would be forced into a similar bad policy until discredit and ruin would overspread the

1871.]

Opinion of the Court—Deady, J.

entire land, by an extinction of all debts; and a consequent prostration of morals, public and private, on the subject of contracts. This evil had, to a certain extent, occurred, and was fresh in the minds of the framers of the Constitution; and no doubt it would again occur in some of the States, but for the provisions under consideration standing in the way, of abrogating the private contracts of non-residents.

“But if Congress passed the law, it must be uniform throughout the United States, then the entire people are equally represented, and have the power to protect themselves against hasty and mistaken legislation, by its repeal, if found oppressive in practice. * * *

“In considering the question before me, I have not pretended to give a definition (but purposely avoided any attempt to define), the mere word, bankruptcy. It is employed in the Constitution in the plural and as a part of an expression: ‘the subject of bankruptcies.’ The ideas attached to the word in this connection, are numerous and complicated; they form a subject, of extensive and complicated legislation; of this subject Congress has general jurisdiction, and the true inquiry is—to what limits is that jurisdiction restricted? I hold, it extends to all cases where the law causes to be distributed, the property of the debtor among his creditors; this is its least limit. Its greatest, is a discharge of a debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress.

“With the policy of a law, letting in all classes, others as well as traders, and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern; it belongs to the law-makers.”

The natural right of an insolvent to dispose of his property as he chooses, is not directly pertinent to the question before the court, but as counsel seems disposed to attach some importance to the claim and made it the basis of an

indirect attack upon the justice and policy of the act if not its constitutionality, it may be well to inquire if there is any such right. Whence comes the property of an insolvent? A moment's reflection will satisfy any one that it represents in whole or in part the credit given to the insolvent by his creditors and therefore in good morals belongs to them and not him. Strictly and truthfully speaking, an insolvent has no property, and therefore he has no natural right to dispose of the property in his possession otherwise than with the consent of the real owners—his creditors.

I know that after a series of conflicting decisions, it was established at common law that a debtor in failing circumstances might prefer a creditor. But the doctrine and practice was never regarded as consonant with good morals, and by the intervention of the Legislature in the enactment of bankrupt and insolvent laws the contrary rule has been generally established. In *Cunningham v. Freeborn* (11 Wend. 256), Mr. Justice Nelson upon this subject, and the kindred one of voluntary assignments, says:

“ The root of the vice in all these cases of voluntary assignments by failing debtors lies in the principle of preference. It affords the pretence for putting the property into the possession of a friendly trustee and thereby may substantially secure to the debtor the control of it for a long time after the law presumes it to have passed from him and when his own possession would be incompatible with its security. In *Estuick v. Cailland* (4 T. R., 424), Lord Kenyon said, that ‘ it was neither illegal or immoral to prefer one kind of creditors to another.’ The soundness of this proposition loses some of its weight, when advanced in a case one would be apt to select above all others to illustrate the reverse; but I can well imagine one that would justify it. As a general proposition, however, the experience and observation of mankind must bear witness against it; and no one knew better than his lordship, and those familiar with courts of justice, how frequently the principle is perverted and made subservient to the gratification of vindictive feelings and the foulest ingratitude, as well as injustice towards honest and confiding creditors.”

1871.]

Opinion of the Court—Deady, J.

The answer of the debtor implicitly admits the indebtedness and insolvency as alleged in the petition, as well as the sale of the debtor's property and the payment of one of his creditors, and simply denies that such sale or payment was made with the intent to defraud or prefer.

Counsel for petitioner assuming that these denials, or some of them, are mere traverses of conclusions of law from the facts admitted, asks that they be disregarded and that judgment be given against the debtor notwithstanding, in accordance with the prayer of the petition.

It is a well settled rule of pleading that a traverse or denial must not be taken on a mere matter or conclusion of law, for the effect would be to submit the question of law to the jury rather than the Court. But when the conclusion is a mixed one of law and fact, then it is clearly traversable and the issue raised thereby triable by a jury under the directions of the Court as to the law. (1 Chitty's Plead., 645; 2 Estee's Plead., 660.) But under Rule 36 of this Court, which provides that "all pleadings and allegations of fact shall be special and verified," a simple denial of the intent alleged in the petition is not, in any case, a sufficient defence thereto.

If the debtor, notwithstanding the admitted circumstances, did not sell his property or make the payment complained of with the intent alleged by the petitioner, he should state with what other intent he did make such sale or payment. By this means the petitioner will be apprised of what the particular defense is, and come prepared to meet it at the trial, or if he thinks it insufficient in law he may demur to it. In this way much unnecessary trouble, vexation, delay and expense is saved to both parties. For instance, if such were the fact, the debtor might allege in his answer that he sold his property as in the petition alleged, for the purpose and with the intent of investing the proceeds in real property in Portland, or for the purpose of loaning the sum on note and mortgage, or investing it in the public funds, as he might lawfully do, and *not with the intent* to thereby hinder, delay and defraud his creditors as alleged in said petition.

The sale of his property by a debtor is not necessarily an act of bankruptcy. It depends upon the intent with which it is done, and as this intent is not a mere conclusion of law but of law and fact compounded, it may be traversed or denied and the matter tried by a jury under the direction of the Court as to the law. Yet it is probable that the act should be so construed as to hold any disposition of a debtor's property to be *prima facie* fraudulent and contrary to the act, and thereby put the burden of proof upon the debtor to show that the same was done with a lawful intent and is therefore not an act of bankruptcy. Such, at least, seems to be the necessary effect of the provision in Section 41, which in terms declares that upon the trial of a petition in involuntary bankruptcy, the debtor shall be adjudged a bankrupt, unless he proves the facts set forth in the petition not to be true.

Although, as has been shown, under the rules of this Court, a mere general denial of the intent with which S. is alleged to have sold his property is not a sufficient plea, but the same must not only traverse the intent alleged, but must state with what other intent it was in fact done, still, I think that when the act is indifferent—not necessarily unlawful, contrary to the statute—that a general denial of the unlawful intent alleged is sufficient to raise an issue and prevent the petitioner from having judgment on the pleadings as for want of an answer. The defect in the answer should be taken advantage of by demurrer. But if the parties choose to go to trial upon such a plea, proof of a lawful intent can be made under it.

So far, then, as the first act of bankruptcy alleged is concerned, the motion must be denied.

As to the payment of the \$100 to the creditor of S., I am satisfied upon the facts admitted that he must be conclusively presumed to have intended to give such creditor a preference. The necessary effect of such payment is to give a preference. I cannot conceive of any circumstances under which an insolvent debtor can make a payment to one of his creditors without intending to thereby prefer such creditor, unless it be when the debtor is ignorant at the

time of his insolvency. In this case the debtor admits that he was insolvent at the time he made this payment, and there is no pretense that he was not aware of it. Indeed, he is presumed to know it until the contrary appears. Under these circumstances, a mere denial of the intent to give a preference is a traverse of a conclusive presumption of law, and therefore frivolous and immaterial.

In *Cunningham v. Freeborn*, cited above, it was alleged in the bill that a certain voluntary assignment was made with a fraudulent intent. The answer of the defendant admitted the assignment, but denied the intent. The case was heard on bill and answer, and in the course of the opinion, the Court held “that the admission of facts which are *per se* fraudulent in judgment of law, are as much so and as conclusive upon the defendant as if he had in express terms admitted a fraudulent intent in his answer; and, in such case, any subsequent disclaimer of such intent will not avail him.”

In *re Drummond* (1 Bank Reg. 11), it was held that a payment of an insolvent debtor to one of his creditors necessarily gave such creditor a preference, and that the debtor, being presumed to know the consequence of such act, was *conclusively presumed* to have intended it.

In *Driggs v. Moore* (1 Abb. U. S. R. 440), there was a similar ruling. The syllabus states the conclusion of the Court in these words: “If, from the circumstances under which the mortgage was given, it must necessarily have operated as a preference, the creditor will not be heard to say in support of the transaction, that the debtor did not intend to create one.”

In *Campbell, Assignee of H. & E. v. The Traders' Bank et al.* (3 Bank. Reg. 124), H. & E. being insolvent, gave their note, with a warrant to confess judgment thereon in settlement of a debt due The Traders' Bank; *Drummond, J.*, held that H. & E. must have intended to give a preference to the Bank. In the course of the opinion he says: “It is to no purpose that a man says, when he is insolvent and signs a note and warrant of attorney, and gives it to his creditor, the effect of which is to enable a creditor to enter up judgment

and issue execution and levy on his property, that he did not intend to give a preference. Actions in this, as in so many other cases, speak louder than words, and the conclusion necessarily follows from such a state of facts, that he does intend to do what is the reasonable consequences of what he does, or according to the oft repeated statement of the books, a man is supposed to know what is the necessary consequence of his own acts."

In *re Smith* (3 Bank. Reg. 98), among other things the petition alleged that Smith, being insolvent, made a voluntary general assignment of his property for the benefit of all his creditors, with the intent to defraud or delay the operation of the bankrupt act and to prevent his property from being distributed according to the provisions of said act. In answer to this allegation the respondent pleaded, that such assignment was made without preference, for the sole purpose of having his creditors share equally his property in proportion to their debts, and not with the intent alleged in the petition. The petitioner moved for judgment on the pleadings, and the motion was allowed. Hall, J., in the course of his opinion, after demonstrating that such an assignment, if upheld, would necessarily and absolutely defeat the operation of the bankrupt act, says: "There can be no possible doubt that the execution of the general assignment under the circumstances of this case, was an act of bankruptcy; and the only question upon which there can be the slightest doubt is, whether, in the absence of any rebutting proof—and even in the absence of a replication to the respondent's answer—the denial of the intention imputed to him, and which is necessary to constitute the act of bankruptcy, must not prevent an adjudication until the question of intention has been submitted to a jury.

"Every person of a sound mind is presumed to intend the necessary, natural or legal consequences of his deliberate act. This legal presumption may be either conclusive or disputable, depending upon the nature of the act and the character of the intention. And when, by law, the consequence must necessarily follow the act done, the presumption is ordinarily conclusive and cannot be rebutted by any

evidence of want of such intention.” See also, *In re Sutherland* (1 Bank. Reg. 140), decided in this Court.

In opposition to these cases no authority is cited by counsel for respondent. He rests his case upon the narrow ground that because the intent to prefer is a necessary ingredient in the act of bankruptcy it may be denied and tried as an issue of fact. But this assumes that the presumption which the law makes from the facts admitted—namely, that a preference was intended—is only a disputable presumption and may therefore be controverted. If, however, the preference is a necessary consequence of the payment, the law conclusively presumes the intent to prefer. This position is correct beyond a doubt, upon both reason and authority. Now, that the giving of a preference is a necessary consequence of the payment by an insolvent debtor of one of his creditors is self-evident. Argument cannot make the matter plainer than the statement of the proposition. The creditor is preferred because he has received his debt and his fellow-creditors have not. The debtor being insolvent has not the means to pay them, and by paying one in full he has defrauded the others of their just proportion of his estate. Other motives may also have actuated the debtor, but that makes the payment none the less a preference. Indeed, he may expect to become able in time to pay all his creditors in full, and may intend to do so as soon as he can, but this does not affect the question. The creditor whose debt is paid is nevertheless preferred over his fellows. He has his money but they must depend upon the often double uncertainty of whether their debtor will in time become both able and willing to pay their debts in full.

Notwithstanding the length of this opinion I cannot omit to notice the oft repeated declaration of counsel for respondent that proceedings in bankruptcy are *quasi* criminal, and must be strictly construed in favor of the respondent. If any part of the act should be so construed it is section 39, which provides for involuntary adjudication.

In re Locke (2 Bank. Reg. 123), Lowell, J., in speaking of this section, says: “it is highly remedial, and should

be construed literally in favor of creditors, because its scope and purpose are to oblige insolvent traders to take advantage of the act, and thus insure an equal distribution of their estate under its carefully framed provisions.”

In re Muller & Brentano (3 Bank. Reg. 86), decided in this court, in reply to a similar argument from counsel against the operations of the act, the court said: “ In my judgment this view of the matter is not supported by reason of authority. The act does not attempt to punish the bankrupt, but to distribute his property fairly and impartially between his creditors, to whom in justice belongs. It is remedial, and seeks to protect the honest creditor from being overreached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life anew. The power to pass laws on ‘the subject of bankruptcies’ is one of the express grants of power to the National Government ; and history teaches that the want of a uniform law on this subject throughout the States was one of the prominent causes which led to the assembling of the Constitutional Convention and consequent formation and adoption of the Federal Constitution.

“Such a statute is not to be construed strictly as if it were an obscure or special penal enactment, and this was the sixteenth instead of the nineteenth century. The act establishes a system and regulates in all their details the relative rights and duties of debtor and creditor. Such an act must be construed—as indeed should all public acts—‘ according to the fair import of its terms, with a view to effect its objects and to promote justice.’ ”

The petitioner is entitled to judgment declaring the respondent a bankrupt on the ground of having paid the debt of Wasserman & Co., with intent to give such creditor a preference contrary to the act.

JOHN PARROTT v. D. N. BARNEY *et al.*

CIRCUIT COURT, DISTRICT OF CALIFORNIA,
JANUARY 25, 1871.

1. **TENANTS' LIABILITY FOR WASTE.**—In the absence of some agreement to the contrary, the tenant is responsible for all waste, however, or by whomsoever committed, except it be occasioned by act of God, the public enemy, or the act of the reversioner himself.
2. **LIABILITY, PUBLIC POLICY.**—The liability of tenants for waste does not depend on negligence, but is imposed on grounds of public policy.
3. **COVENANT, WAIVER, ETC.**—A covenant in a lease to surrender the premises at the expiration of the term in as good condition as the reasonable wear thereof will permit, damages by the elements excepted, does not protect the tenant from liability for waste, resulting from accidents occurring without his fault.
4. **IDEM.**—A covenant in a lease requiring the tenant to occupy the premises for a specific purpose, as an express office, does not impose on the landlord, and exempt the tenant from, all the risks incident to such business, not resulting from the wrongful acts or negligence of the tenant.
5. **WASTE IN APARTMENTS.**—Waste may be committed by a tenant of a portion of a building.
6. **ACCIDENTS.—LIABILITY FOR DAMAGES TO ADJOINING PREMISES.**—Defendants are expressmen carrying packages between New York and California. A wooden case containing nitro-glycerine was delivered to defendants at New York, to be carried to Los Angeles, California, in the ordinary mode, and in the ordinary course of business. No questions were asked, and no information given, as to its contents. On arriving at San Francisco, a liquid resembling oil appeared to be leaking from the case, and it was taken to the office of defendants, the premises leased from plaintiff, for examination. While under examination it exploded, injuring the premises occupied by defendants, and other premises of the plaintiff leased to, and occupied by, other parties. Defendants had no knowledge of, and no reason to suspect, the dangerous character of the contents, and there was, under the circumstances, no negligence on their part. *Held*, that defendants were not liable for the damage resulting from the accident to plaintiff's premises, occupied by other parties adjoining the premises held and occupied by defendants, but were liable for waste resulting to the premises occupied by themselves.
7. **CARRIER NOT ENTITLED TO KNOW CONTENTS OF PACKAGES.**—A common carrier is not, under all circumstances, entitled to know the contents of packages tendered for carriage, and a mere failure to ascertain whether the package contains anything dangerous, there being no reasonable ground for suspicion, does not, of itself, constitute negligence.
8. **PERFORMANCE OF LEGAL DUTY MAY BE ASSUMED.**—In the exercise of his lawful rights, every man has a right to act upon the hypothesis that

Abstract of Pleadings.

[Jan.]

every other person will perform his duty, and obey the law; and in the absence of any reasonable ground to think otherwise, it is not negligence, to assume that he is not exposed to a danger, which can only come to him from a violation of law on the part of some other person.

Before SAWYER, Circuit Judge.

ABSTRACT OF PLEADINGS.

The complaint contains four counts.

The first is for technical waste by the landlord against his tenant from year to year, based on the statute. The waste is charged to have resulted from negligently introducing an explosive substance, etc. Treble damages are claimed.

The second is in the nature of a count in case at common law, by the landlord against a stranger, for injury to his reversionary interest in the premises demised to his tenants, Bell and the Union Club. The injury is alleged to have resulted from negligently introducing, etc., the explosive substance.

The third, is by the landlord against his tenant, for waste to the demised premises, and also, for injuries resulting from the same acts to the reversion in the other premises, demised to other tenants. It is in the nature of a count in case at common law. The injury is alleged to have resulted from negligence.

The fourth, for waste committed on the premises demised to defendants, and for injuries committed by defendants *vi et armis*, to the premises demised by plaintiff to Bell, and the Union Club.

The answer takes issue on all the material allegations; also sets up a lease under which defendants occupied, and a right to carry on the business of expressmen in the demised premises; and also avers a repair of the demised premises, before suit brought, to plaintiff's satisfaction, and with his approbation.

FACTS AS FOUND BY THE COURT.

The cause was tried by the Court without a jury, the parties having waived a jury, in pursuance of the statute. The Court found the facts to be as follows:

1871.]

Statement of Facts.

The defendants constitute the well-known express company doing business under the name of Wells, Fargo & Co. The plaintiff had for many years prior to the commission of the grievances complained of, been, and he then was, seized in fee of the premises in question. On the seventh day of November, 1855, said plaintiff leased to defendants for a period of two years from the first day of January, 1855, a portion of said premises described in the lease as "The basement and first floors contained in that certain granite building, situate in the city of San Francisco, on the northwest corner of California and Montgomery streets, together with all vaults and permanent banking fixtures therein contained; together with the use of a brick warehouse in the rear, thirty by sixty feet, and the right of way and for passage thereto through the back yard of said premises, and all appurtenances thereunto belonging." Said lease contained the following covenants on the part of defendants, viz.: "It is likewise agreed that the said parties of the second part shall not receive in said demised premises, either for their own account or on storage, or allow any person to place therein, gunpowder, alcohol, or any other articles dangerous from their combustibility; that they will, during the term of this lease, occupy the premises solely for the business of their calling, to wit, banking and express office, and that they are not to underlet the same to any other person or persons, for any other business in part or the whole, without the prior consent in writing of the party of the first part." The defendants, also, covenant, "At the expiration of the said term to quit and surrender the said demised premises, with all fixtures therein contained, in as good condition as the reasonable use and wear thereof will permit, damages by the elements excepted." The rent was twelve thousand dollars per annum, payable in monthly installments of one thousand dollars each in advance. The lease was afterwards renewed on the same terms, for two years, from January 1st, 1858, and again for a term of two years, from January 1st, 1860. After the expiration of the latter term, the premises were held over from year to year, without any further special agreement,

Statement of Facts.

[Jan.]

until the sixteenth day of April, 1866, the time of the commission of the alleged grievance, the defendants all the time paying rent to the plaintiff, in accordance with the terms of said lease. Before, and at the last-mentioned time, one Garrett W. Bell, as tenant from year to year of said plaintiff, occupied a portion of the buildings described in the complaint, to wit: "The first, or lower floor of said iron building, and of that of the said brick building, situate to the northwest thereof, and called a furnace;" also, a certain corporation, called "The Union Club of San Francisco," as tenant of plaintiff, upon terms hereinafter stated, was in the possession and occupation of the remaining portions of the said premises, being the whole above the first, or lower floor of all the said buildings and premises. The immediate reversion of the whole of said premises, as well those demised to the defendants as those occupied by said Bell and the Union Club, remaining all the time in said plaintiff. The portion of the premises occupied by said defendants had been used for their banking and express business, as provided in the said lease, from the commencement of the term down to, and including, the sixteenth day of April, 1866. The defendants, during all that time, were carrying on the business of public express carriers throughout various parts of the United States, the States and Territories of the Pacific Coast, and between the United States and Europe; also, between New York and San Francisco, by the way of the Isthmus of Panama, using on the latter route the steamships of the Pacific Mail Steamship Company's lines, running between New York and Aspinwall, and Panama and San Francisco, to convey their express matter, transporting the same across the Isthmus by the Panama Railroad. The said steamers at that time left New York three times each month—on the first, eleventh and twenty-first days of the month. It was a regulation established by defendants, that no express freight should be received at the wharf in New York on days appointed for the steamers to leave New York for Aspinwall. The said steamers sailed from pier No. 42, North River. On the afternoon of the last regular day for the steamer to leave

1871.]

Statement of Facts.

New York for Aspinwall, prior to March 14, 1866, and after the steamer had left, a man brought to pier No. 42, North River, from which said steamers take their departure, a case in a wagon, and asked Patrick O'Leary, who was an employee of the defendants, to receive it. O'Leary was the defendants' freight measurer on pier No. 42. O'Leary informed him that they did not receive freight on the day of the steamer's sailing. The man said it would be hard to require him to take it back, as he had brought it a great way, from Harlem, some seven miles distant. O'Leary told him, that, since he had brought it so far, he could leave it there at his own risk, but that he could not give a receipt for it on that day; that the party must come the next day and get a receipt. The party then carried in the case and placed it opposite the freight office on the dock. O'Leary then noticed that the case had not been marked or weighed, or strapped, as required by defendants' regulations, and called the party's attention to these facts; whereupon he requested O'Leary to weigh, mark and strap the same, saying that he would pay for it. O'Leary then, in pursuance of the party's directions, marked upon the box the address, "W. H. Mills, Los Angeles, Cal. Fast." He also procured some wooden straps, or hoops, some nails and an adze, and strapped the case, driving the nails through the hoops, or straps, into the case, as required by defendants' regulations. The case then lay there ten days, till the next steamer left. Two days after the case had been thus left, the party who brought it came down and applied to O'Leary for a receipt, and O'Leary told Mr. Middlebrook to give a receipt for the case, and Mr. Middlebrook, who was the tally clerk at the time, and the proper party to give the receipt, did so in the presence of O'Leary. At the time the case was presented, it was clean and appeared to be in perfect condition. There was nothing suspicious about its appearance. The only thing wanting to make it conform to the regulations of the defendants was, it required strapping, weighing and marking, and when strapped, weighed and marked by O'Leary, it appeared to be in all respects in proper condition for shipment. The case was an ordinary

Statement of Facts.

[Jan.]

wooden box used for shipping goods in, apparently some two and a half feet square by three feet long. It measured fourteen feet eleven inches cubic measure, and weighed three hundred and twenty-nine pounds. The usual course of business in receiving such freight is, that O'Leary received and marked it, Middlebrook gave a receipt for it, and it then remained on the wharf with other freight, without any one taking other special notice of it, till it was carried on board ship and stowed by the stevedores; and this case took the usual course. The party receiving the receipt subsequently presents it at the office to the express receipt clerk, who takes it up, and from it makes out the ordinary express receipt, and delivers it to the shipper. In this instance, the receipt thus given by Middlebrook was surrendered, and the usual express receipt given. The receipt given by the tally clerk (such as that given by Middlebrook in this instance) on the delivery of the freight, is the original from which the express receipts, bills of lading, manifest, and all others are made up. The clerk making out the express receipt for the shipper, or the bill of lading, as the case may be, is governed by this original, and he does not see or inspect the freight itself. After express matter is thus delivered, and the said original receipt is given to the party delivering it, it goes into the general mass of freight of that kind, and there remains till taken on board the steamer. Neither at the time of the delivery of the case in question, nor of the taking of said receipt, was there anything said about the contents of this box, either between O'Leary and the party bringing it, or between the latter and O'Leary and Middlebrook, nor at any other time; nor, so far as appears by the evidence, at any time to the defendants, or any of their employees, and neither of said employees or defendants had any idea or suspicion that it contained anything dangerous. No questions were asked as to its contents, and no information given. The said case was shipped with a large quantity of other express freight, on the steamer that left New York for California on the twenty-first of March, 1866. At that time the defendants sometimes carried to California as many as

1871.]

Statement of Facts.

six thousand packages, put up in cases of a similar character and appearance, per steamer, in addition to a large number shipped for Panama, South America, Mexico, and other places, and a fair average of such packages of merchandise, shipped to California by each steamer, was from four to five thousand. The steamer from Panama, connecting with the steamer which left New York on the twenty-first of March, arrived in San Francisco in due time, on the thirteenth or fourteenth of April, having the said case on board. On the afternoon of the fourteenth, the said case was taken from the vessel and placed upon the wharf, and was found to be leaking. The leakage had evidently commenced since the steamer left Panama, and the substance leaking from the case had the general appearance of sweet or salad oil. Said case was left on the wharf till the morning of the sixteenth day of April, when, in pursuance of the regular and ordinary course of defendants' business, where express freight is found to be damaged, it, together with another case of somewhat similar appearance, containing silverware, which had been stained by the substance leaking from the case in question, and appeared to be in a damaged condition, was sent by a dray to the defendants' office, the premises so occupied by defendants as aforesaid, for examination, and the Steamship Company notified to send an agent to be present and examine the package in conjunction with an agent of defendants, for the purpose of ascertaining the nature and extent of the damage, and of determining, if possible, whether the responsibility for the damage rested upon the Steamship Company. The two packages were taken to the said premises by defendants' servants, and deposited on said premises in the open court or yard, in the rear of the Express Office, and between it and the premises occupied by Bell, which was the usual place of examination of such packages when found to be damaged. About one o'clock P. M., Mr. Havens, as the representative of the Pacific Mail Steamship Company, and Mr. Webster, of the defendants, in company with another of defendants' employees, and in the presence of Mr. Knight, the second person in authority in the management of defendants' busi-

Statement of Facts.

[Jan.]

ness on the Pacific Coast, with a mallet and chisel proceeded to open the case for examination, and while engaged in opening the said case with the mallet and chisel, the substance contained in it exploded, instantly killing all the said parties and one or two others, besides destroying and greatly injuring the premises in the manner described in the complaint. The plan and mode of opening and examining the case in question, was the same usually adopted in the ordinary course of the defendants' business in respect to packages of a similar appearance. Upon a subsequent examination and experiment with chips saturated with the liquid which had leaked from the case, taken from the wharf and other places where said leakage had occurred, it was ascertained that the substance contained in the package was nitro-glycerine, or glonoin oil. The said case contained some thirty gallons of nitro-glycerine, and the explosion of this substance occasioned the loss of life and injuries stated. Nitro-glycerine, when pure, is a nearly colorless substance, but when impure, it is nearly the color and consistency of sweet or salad oil. It is a liquid, and violently explosive. It is exploded by percussion and concussion, and by a high degree of pressure, but not by the mere contact with fire, either with flame or a burning coal. It will burn slowly without exploding by applying a flame to it, while the flame is in actual contact, but when the flame is withdrawn, it will cease to burn. Although it will burn while in contact with flame, yet it takes fire with difficulty, and is not, in the common sense of the term, "apt to take fire." It is not dangerous from the mere application of flame—as the flame of a candle—but in explosion, combustion takes place, and in that view it is combustible and dangerous. It will also explode upon being heated to a temperature of some 360 degrees Fahrenheit. It gradually decomposes when kept, and decomposition in a closed vessel disengages gases, the pressure alone of which may spontaneously explode it. Pressure, or the application of force, is the immediate cause of the explosion. In this instance, the nitro-glycerine, in one or more of the cans contained in the case in question, had, doubtless, become partially decomposed, generating

1871.]

Statement of Facts.

gases, which occasioned pressure within the can, and a greater tendency to explode from external forces, and the percussion, or concussion, resulting from opening the box with the mallet and chisel, operating in connection with such internal pressure, must have produced the explosion. Its discovery was announced in 1847, by Sobrero, a chemist at Paris: in 1848 or 1849, Dr. Herring, of Philadelphia, made experiments with it to test its medicinal properties, and proposed for it the name of "glonoine." Thereafter it was experimented with by various chemists, and its constituents and properties were mentioned in chemical treatises and scientific publications, and were taught as part of a college course of chemistry in some colleges as early as 1862; but prior to 1864, experiments upon nitro-glycerine were confined wholly to the laboratory of the chemist. It was only made in small quantities for scientific purposes. In 1864, it was proposed by Noble, in England, for blasting purposes. In June, 1865, he made some experiments in blasting, demonstrated its extraordinary power, and introduced it to a limited extent in some of the European quarries and mines. He also published in England, in the summer of 1865, a pamphlet setting forth its qualities and advocating such use of it as possessing in volume about thirteen times and in weight eight times the explosive force of gunpowder. He patented it in England as Noble's patent blasting oil.

An account of the constituents, mode of preparing, and properties of nitro-glycerine was published on the eighteenth of November, 1865, in the *Scientific American*, a weekly periodical published in the city of New York, devoted to the expositions of subjects connected with science and the useful arts. In said article, Noble proposed to use it for blasting purposes, and his claims of its superiority therefor over gunpowder are set forth and commented on, directions for its use given, etc.

In December, 1865, an accidental explosion of nitro-glycerine occurred at a hotel in the city of New York, which was mentioned in the newspapers of the day.

The second steamer arriving from Panama, prior to the

Statement of Facts.

[Jan.]

arrival of the steamer bringing the case in question, being some twenty days prior to the latter's arrival, brought a consignment of nitro-glycerine to Bandmann, Nielsen & Co., of San Francisco, which had been shipped to that house by Noble for sale, direct from Hamburg, by way of Panama. Letters of advice of said shipment had come to Bandmann, Nielsen & Co. by a previous steamer, and the firm had published circulars, stating the fact that they would have the new blasting agent for sale, and stating its properties, and had sent them to various newspapers, some of which had noticed it in their columns. Among these, at the solicitation of said firm, the San Francisco *Mining and Scientific Press*, a weekly publication issued in San Francisco, devoted especially to mining and scientific matters, in the numbers of the twenty-third and thirtieth of December, 1865, called attention to nitro-glycerine as a blasting agent, in two articles, illustrating with cuts the mode of using it, and containing testimonials of its extraordinary explosive force, and accounts of experiments with it, made the summer preceding, in mines and quarries on the Continent of Europe. The said defendants subscribed for and received at their place of business, in San Francisco, together with a large number of other periodicals and publications, the said periodical, but they seldom read it, and did not read or notice the said articles on nitro-glycerine. Upon the arrival of said shipment by said steamers from Panama, Bandmann, Nielsen & Co. made some experiments in the vicinity of San Francisco in private, excepting in the presence of two or three persons, testing its properties, which proved successful; and they let the Central Pacific Railroad Company have some for trial, and had just received a favorable report from the engineer, which Mr. Bandmann was in the act of copying at the moment of the explosion in question at defendants' office.

Until the receipt of the advice of the said shipment from Noble, Bandmann had never heard of nitro-glycerine, glonoin oil, or Noble's patent blasting oil, and he did not know of the existence of such a substance. A second shipment of nitro-glycerine was made by Noble to Bandmann, Nielsen

1871.]

Statement of Facts.

& Co. from Hamburg by the steamer *European*, which exploded, destroying the said steamship at Aspinwall, on the eighth day of April, 1866, eight days before the said explosion at defendant's express office; but the news of the explosion at Aspinwall had not reached San Francisco on the day of the explosion now in question. Although Noble made some efforts to bring his nitro-glycerine into notice in 1865, and had made these two shipments to Bandmann, Nielsen & Co. early in 1866, and the latter had taken the steps indicated, to bring it to the notice of the public in California, at the time the case in question was shipped at New York and received at San Francisco, nitro-glycerine was generally unknown to the public as an article of commerce, of practical utility, or otherwise, and was unknown to parties engaged in the business of transportation; and, at that time, there was no oil or liquid, of an explosive character like nitro-glycerine, known to commerce; and even among scientific men, the properties of nitro-glycerine were not so well understood as at present. The two explosions at Aspinwall and San Francisco, and the subsequent ones at Sydney and in England, called the attention of scientific men to the subject, and led to fuller investigations, and more precise knowledge of its properties. Neither the defendants, nor any of the employees of the defendants, nor of the Pacific Mail Steamship Company, who had anything to do with the package in question, nor the managing agent of the defendants on the Pacific Coast, nor any of those killed by the explosion, knew the contents of the case in question, or had any means of such knowledge, or had any reason to suspect its dangerous character, nor did they know anything about nitro-glycerine, or glonoin oil, or that it was dangerous. The case had the appearance of other cases usually received in the ordinary course of defendants' business; was received and handled by the employees of the defendants in the same way that other cases of similar appearance were usually received and handled, and in the mode that men of prudence engaged in the same business would have handled packages having a similar appearance in the ordinary course of business, when ignorant

of its contents, and with similar means of knowledge, as that possessed by defendants and their employees in the instance under consideration. There was no negligence on the part of the defendants in receiving said package, or in their failure to ascertain the dangerous character of the contents; or, in view of the condition of their knowledge, of the want of means of knowledge, and the absence of any reasonable ground of suspicion, no negligence in the handling of the said package at the time of the explosion. The defendants either repaired or paid for the repairs (to the amount of about six thousand dollars) of the premises occupied by themselves, except a portion of certain repairs made by plaintiff, which were necessarily made in connection with repairs made to those portions of the premises occupied by the other tenants of the plaintiff, and which defendants omitted to pay for by mistake.

The value of the repairs to the said premises occupied by defendants, and chargeable thereto, thus omitted to be paid by them, is one thousand seven hundred and eighty-seven dollars and sixty-two cents.

The damages resulting from said explosion to the premises not occupied or held by defendants, but occupied by the other tenants of plaintiff named in the complaint, viz: Bell and the Union Club, is twelve thousand eight hundred and fourteen dollars and sixteen cents.

The portions of the injured premises occupied by the Union Club, at the time of the explosion, were so occupied under a verbal agreement with the plaintiff, to hold for two years, from the first of February, 1866, at a rent of five hundred and sixty dollars per month. The said lessees were "to keep the premises in ordinary repair—in decent, tenantable repair." This rent was paid up to the date of the explosion. After the explosion the Union Club refused to pay rent, on the ground that the premises were in an untenable condition, and did not pay rent from the fifteenth day of April, till the first day of August—a period of three and one half months—and the rents for said period, according to the terms of the said verbal agreement, and which said Union Club did not pay, amount to nineteen hundred and sixty dollars.

1871.]

Opinion of the Court—Sawyer, J.

The premises during all of said period were in an untenable condition, in consequence of said explosion, and said time was occupied in making the necessary repairs, and the said time was a reasonable time for making said repairs.

The said several amounts found are values and damages respectively in gold coin.

J. P. Hoge and Jno. T. Doyle, for plaintiff.

S. M. Wilson, for defendants.

SAWYER, Circuit Judge. As to the waste on the premises demised to the defendants, I adopt the views expressed by the District Judge, in his opinion on the demurrer, and I need not repeat the reasoning here. (1 Deady's Rep. 405.) Whether the waste complained of is technically permissive, or commissive, I think it falls within the provisions of the statute. And on the facts found, I think the defendants liable, although, as will hereafter appear, there was, in my judgment, no negligence on their part. There was, doubtless, fault on the part of those who delivered the explosive substance to defendants for carriage over their express route, without informing them of the dangerous character of the article, for which they may be liable to defendants. The rule seems to be established, that, with respect to liability for waste, the tenant is in a position analogous to that of a common carrier, and without some special agreement to the contrary, responsible for all waste, however or by whom committed, except it be occasioned by act of God, the public enemy, or the act of the reversioner himself. (4 Kent, 77; *Attersol v. Stevens*, 1 Taunton, 183; *Cook v. Champlain Transportation Co.*, 1 Denio, 91; 2 Eden on Inj. 198 and notes.) In *White v. Wagner* (4 Harris and John. 373), this doctrine was carried out in an extreme case. The tenant is held responsible to the landlord, and left to his remedy over against the delinquent party. The liability does not depend on mere negligence, but it is imposed on the same grounds of public policy as those upon which the strict liabilities of common carriers are made to rest.

It is claimed in this case, that the covenant in the lease "at the expiration of the term to quit and surrender the said demised premises * * in as good condition as the reasonable use and wear thereof will permit, damages by the elements excepted," is a waiver of the tort; that it only binds the defendants to reasonable care, and protects them from liability for waste, resulting from accidents occurring without their fault. Also, that the covenant to "occupy the premises solely for the business of their calling, to wit: banking and express offices, and that they are not to underlet the same to any other person or persons, for any other business in part or the whole, without the prior consent in writing of the plaintiff," both entitles and requires the defendants to occupy the premises as an express office, and that by authorizing and requiring the defendants so to occupy, the plaintiff took upon himself all the risks incident to such business, not resulting from the wrongful act or negligence of the defendants; and that the accident in question is one of the risks so incident to the business, and for which defendants are not liable. After some hesitation, I conclude that neither of these positions is tenable; as to the first, one or two authorities seem to favor that view, but the weight of authority appears to be the other way. The authorities cited to sustain the latter proposition do not appear to me to be applicable to the facts of this case. If the defendants' counsel is correct in his position, I do not perceive why a tenant, who is to occupy the premises for a lawful purpose, in accordance with the terms of his lease, should be liable in any case for waste resulting from the wrongful act or negligence of a stranger, he himself being faultless. This would be totally inconsistent with the rule as stated in the authorities already cited.

It is also insisted that no waste can be found where the *land itself* is not the subject of the demise, and that, as defendants were only tenants of the basement and first story, there could be no waste. It does not appear to me that the authorities cited go to that extent. There may be a freehold estate in apartments (1 Greenl. Cruise., p. 49, sec. 21). The absolute destruction of the basement and first floor,

1871.]

Opinion of the Court—Sawyer, J.

demised to defendants, in the building described in the complaint, falls clearly within the defendants' own definition of waste, viz: "Waste is a spoil and destruction of the estate, either in *houses*, woods or *lands*, by demolishing not the temporary profits only, but the very substance of the thing." Here is the destruction of the substance of a house, and even of land in the legal sense of the term, which embraces the building. The result is, that the defendants are liable for the waste on the premises demised to them.

As to the premises demised to other tenants, the question of liability depends upon entirely different principles. The action is not based upon the covenants in the lease to defendants, and it is, therefore, unnecessary to inquire whether there was a breach of the covenant in that lease, not to introduce into the premises demised to defendants, any articles "dangerous from their combustibility." I do not perceive that the relation of landlord and tenant, between the plaintiff and defendants, as to other premises than those injured, has any bearing unfavorable to the defendants upon the question of their liability. The defendants, in my judgment, stand in this kind of action in no worse position as to the premises occupied by Bell and the Union Club, than they would have been in, had the explosion taken place upon the premises of which they themselves were seized in fee, and destroyed the adjoining premises, leased by plaintiff to said Bell and the Union Club. What are the rights and responsibilities of the parties upon the facts, considered as strangers to each other, with respect to those premises? If the defendants are liable, it must be upon one of two grounds, either, *firstly*: that a party who introduces upon his own premises a highly dangerous substance, which, in consequence of such introduction, in some way injures his neighbor, is liable for the damages at all events, and under any and all circumstances, without regard to fault or negligence; or *secondly*: that the injury has been caused through the negligence and want of proper precaution and care in the party in introducing, or in managing such a substance after its introduction. Plaintiff's counsel insist that defendants are liable upon both grounds. In support of the first

ground, the strongest case cited is *Fletcher v. Rylands et al.* (Law Rep. 1 Exch. 265); and the same case in the House of Lords on appeal, affirming the judgment of the Court below. (Law Rep. 3, Appeal Cases, 330.) The defendant in that case constructed a reservoir to supply water for a mill situate upon his own premises, into which he diverted from their natural course the waters of a stream. In the construction of the reservoir, the engineer and workmen found five old shafts, which had been filled up with marl and clay. The shafts led down to certain passages, which had been excavated in working a coal mine, and which extended to, and connected with, the mine of the plaintiffs on their own premises, adjacent to those of defendant. The defendant was not aware of the existence of either the shafts or passages on his premises, but his workmen and engineer, in constructing the reservoir found the shafts, although they did not know with what they connected. The water from the reservoir broke through one of the shafts, ran through the passages into plaintiff's mine, and produced the injury in question in the action. The Court found, as a fact, that *there was negligence* on the part of the defendant's engineer and workmen in the construction of the reservoir; but the decision was not put on that ground. The defendant was held liable, and it must be admitted that the Court stated broadly, that when a party brings an article upon his premises *known* to be dangerous, and liable to escape upon his neighbor's premises, and do injury, he is bound to see that it does not escape and do harm. The other cases cited, are cases where parties in blasting with gun, or blasting powder, upon their own premises, have thrown rock upon, and injured their neighbors, or their neighbors' premises, and cases of a similar character, as *Hay v. Cohoes Co.*, (2 N. Y. 159). The observations of the judges in delivering their opinions, must be considered with reference to the facts of the cases decided. In all these cases, and the examples cited by the judges as illustrations of the principle adopted, the liability to escape and do injury, and the dangerous character of the article introduced, were necessarily known to the party introducing it. The

1871.]

Opinion of the Court—Sawyer, J.

properties of water and gunpowder are known to everybody. The liability of water collected in large bodies to escape through pressure, and of gunpowder to violently explode and do injury, are known to all persons of common sense in civilized communities, no matter how ignorant they may be in literary and scientific matters. It is a part of the common and general knowledge of the community, of which everybody is presumed to be possessed and of which, as such, the Courts are bound to take judicial notice. Any party who introduces these things into his premises, does so with a full knowledge of their dangerous properties, and of their liability, even with the utmost care and precaution, to elude his vigilance, baffle his control, escape and injure his neighbor. It is worthy attention, that in the case of *Fletcher v. Rylands*, in the Court of Exchequer, two of the Judges were of opinion that defendant was not liable, and judgment was entered in accordance with this view; but the judgment was reversed on appeal in the Exchequer Chamber, and this last judgment affirmed in the House of Lords. Blackburn, J., who delivers the opinion of the Court in the Exchequer Chamber, does not fail to note *knowledge* on the part of defendant of the liability to escape and do mischief, as an important element to be considered on the question of liability. He says: "It seems but reasonable and just, that the neighbor, who has brought something on his property which was not naturally there, harmless to others so long as it is confined to his own property, *but which he knows* to be mischievous, if it gets on his neighbors', should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property." (1 Law Rep. Exc. 280.) And his illustrations clearly show, that *knowledge* is an important element in the liability. For instance, he says, that a man is answerable for damage done by the escape of his beasts into his neighbor's field, for the *grass they eat* and *trample* on; for this is the *natural consequence* of their escape; but he is not liable "for any injury to the persons of others, for our ancestors have settled that it is not the general nature of horses to *kick* or bulls to *gore*: but if the owner *knows* that

Opinion of the Court—Sawyer, J.

[Jan.]

the beast has a vicious propensity to attack man, he will be answerable for that. (*Id.*) Again, “so in *May v. Burdett*, the Court, after an elaborate examination of the old precedents and authorities, comes to the conclusion that, ‘a person keeping a mischievous animal, *with knowledge* of its propensities, is bound to keep it secure at his peril.’ And in 1 Hale’s Pleas of the Crown, 430, Lord Hale states that when one keeps a beast, *knowing its nature or habits* are such that the natural consequence of his being loose is, that he will harm men, the owner ‘must, at his peril, keep him up safe from doing hurt, for though he use his diligence to keep him up safe, if he escape and do harm, the owner is liable for damages.’ * * * In these latter authorities, the point under consideration was damages to the person, and what was decided was, that *when it was known* that hurt to the person was the *natural consequence* of the animal being loose, the owner should be responsible in damages for such hurt, though when it was *not known* to be so, the owner was not responsible for such damages; but where the damage is like *eating grass* or other ordinary ingredients in *damage feasant*, the *natural consequence* of the escape, the rule as to keeping in the animal is the same.” (*Id.* 281.) In affirming the judgment of the Exchequer Chamber, in the House of Lords, the Lord Chancellor quoted the first passage above cited from the opinion of Blackburn, J., together with the context, and said, “In that opinion, I must say, I entirely concur.” (3 Law Rep. Appeal Cases, 340.) Thus, it is apparent from the language used and the illustrations cited, that *knowledge* of the dangerous character, or mischievous propensities of the thing or animal introduced on the part of the party introducing it, is an essential element in the cause of action. The “natural consequences” of the escape must be *known*, but the *ordinary* natural consequences of the escape of a tame beast, as the eating and trampling down of grain, grass, herbage, etc., the damage from flooding with water, filth, etc., are matters of universal knowledge, of which everybody is presumed to be cognizant, and of which everybody is bound to take notice. Since a party is bound to know those things,

1871.]

Opinion of the Court—Sawyer, J.

the law presumes that he does know them, and holds him responsible without special allegation or proof of knowledge. But all tame animals are not vicious—the goring of a man is not the ordinary consequence of an escape of a tame beast. When such a beast is vicious and liable to attack and gore people, or do other like kinds of mischief, it is an exception to the general rule, and all mankind are not presumed to know his vicious propensities; hence, in order to render his owner liable for such mischiefs done upon an escape, it is necessary to specially bring home to him knowledge of his vicious tendency. When this knowledge is brought home to him, he is presumed to know the ordinary consequences of the escape of such animal, and is liable for his vicious acts, as in other cases of *knowledge*. I know of no case, in which this doctrine has been held, unless knowledge of the propensities or character of the thing working the injury must be presumed by the law from its generally known character, or knowledge was specially brought home to the party dealing with it. Knowledge, therefore, in some form, must be an essential element in the cause of action. There is some reason for holding that a party who introduces into his premises a substance known to him, or which he is bound to know from the present universal knowledge of mankind, to be dangerous to his neighbor, shall do so at his own peril and be responsible for the consequences. He deals with the article with full knowledge of his peril, and knowingly assumes the risk. Should he suffer, it would be in consequence of his own folly, if not his fault. But why should a person innocently ignorant of the qualities of a dangerous thing unconsciously brought upon his premises in the pursuit of a lawful calling, not only be compelled to sustain the damage suffered himself, but, also, that suffered by his neighbor from an accident resulting therefrom without his fault. Upon what sound reason can such a doctrine be sustained? To carry the rule to that extent would be, to make every man an insurer of his neighbor against the consequences of all his acts, however faultless they may be. In my judgment, the law is not so rigorous and unreasonable.

But it is not clear, that even as to things universally known to be dangerous, the doctrine laid down can be sustained in the broad language sometimes used in discussing a given state of facts. Fire, for instance, is an element known to all men to be dangerous, yet there are numerous cases where fires purposely set in a party's own grounds have spread to and damaged his neighbor's premises; as, for example, in clearing lands, in which the party setting the fire has been held not to be liable, unless there was negligence. So in the case of water, it was held that when one builds on his own land a mill-dam, on a proper model, and the work is faithfully done, he is not liable to an action though it breaks, and his neighbor's dam and mill are thereby destroyed. (*Livingstone v. Adams*, 8 Cow. 175.) To the same effect are *Hoffman v. Tuolumne Water Co.* 10 Cal. 413, and *Campbell v. B. R. and A. W. and M. Co.* 35 Cal. 683. These were not cases that could be referred to *vis major*. I can perceive no good ground for distinction as to the question of liability, between thus accumulating upon one's land water in a natural stream largely beyond the natural quantity, and introducing it from abroad. (See also as to bursting of water pipes, *Blythe v. Birm. Water Co.*, 11 Exch. 781.) These are but examples of a very large number of cases of like character. Why were not the defendants in these instances responsible for all damages resulting to their neighbors, if a party introducing or dealing with a dangerous article, thing or element upon his own premises is liable at all events, and under all circumstances, without reference to negligence, or any fault on his part? And in these cases the parties had *knowledge* of the dangerous character of the matters with which they were dealing. If I am right in the views thus far suggested, the first proposition upon which the liability of defendants for the injuries to the premises occupied by Bell and the Union Club is rested, is untenable.

There must then have been knowledge, on the part of defendants, of the dangerous character of the explosive substance introduced upon the premises occupied by them, or there must have been what the law deems negligence on

1871.]

Opinion of the Court—Sawyer, J.

their part, or there is no liability. Upon the question of knowledge, I am satisfied from the evidence, and I so find the facts to be, that nitro-glycerine, at the time of the explosion in question, had not become so generally known to the world, commercial or otherwise, as to be a part of the ordinary knowledge of the people, even in intelligent communities. It had hardly yet emerged from the domain of strictly scientific research. It is true, that, at the time, it had recently, to a very limited extent, been introduced to the knowledge of miners and others in Europe; but only to a limited extent. At the very time, efforts were being made by a single person to introduce it into this country for blasting purposes. A short time (but a few weeks) before, an effort had been made—and the first effort of the kind—by one house, to whom a consignment had been made, to bring it into notice in this State; but it does not appear that it had been introduced into public use in other parts of the United States. This knowledge of the article, both of its name and its properties, was confined, comparatively speaking, to a very few. Of course, it is impossible to ascertain, even approximately, the exact extent to which it had become known; but from the general tenor of the evidence, I think it might be safely assumed that not one in a thousand in the United States, or California, would have known anything about the substance or its properties, had it been mentioned by its common name, glonoin oil, or nitro-glycerine. However that may be, it is very evident, that it was known outside of the laboratory of the chemist to a very limited extent, and not sufficiently to be recognized as a part of the common knowledge of the country, even in intelligent circles. It was new—I might say, almost entirely unknown—to commerce. It had not obtained such notoriety that ordinary people, or commercial men, can be presumed to be cognizant of its properties. As an illustration of the state of knowledge, even among scientific men and chemists, of several professors of that science in our colleges and University, examined as experts on behalf of the respective parties, not one had heard of nitro-glycerine, as an article of commerce, or of practical utility, or outside

Opinion of the Court—Sawyer, J.

[Jan.]

the domain of science, prior to the explosion in question in 1866. One professor, who appeared to be well informed in his profession, and as to the article in question, could not say that it had before that time been brought to his attention, even as a matter of scientific interest. Another, who had formerly been a Professor of Chemistry in the Normal College, in Swansea, Wales, and who has for several years been, and now is, the Analytical Chemist of the San Francisco Refining and Assaying Office, and Professor of Chemistry in the Toland Medical College, also in the City College, was so little familiar with nitro-glycerine and its properties, that after the explosion, when some of the chips, saturated with the substance which leaked from the case on the wharf, were taken to him for analysis, he did not know what it was. Even after he had proceeded some time with the analysis, applying various tests, and after an accidental explosion had taken place in the course of the process of the analysis, the name of the article did not suggest itself to him till he had consulted his toxicological works, and found that a substance apparently having the same properties, was called nitro-glycerine; yet, he had years before experimented with it in the laboratory as a matter of scientific interest, but the fact had passed from his recollection. In point of fact, attention appears from the evidence to have been but little directed towards the substance, even in the scientific world at large, until called to it by the explosion in question, the one at Aspinwall about the same time, and one or two others occurring at a later date. Since then it has been the subject of extensive experiments, which have brought to light much of the present prevailing particular knowledge with reference to its properties. With so little general knowledge of the substance, at the time of the accident, outside the laboratory, even among chemists and scientific men, who usually take a special interest in such substances, and who are more likely to notice the progress of their introduction into the practical affairs of life, it could scarcely be expected that the public generally engaged in the ordinary pursuits of agriculture, manufactures and commerce, would be informed upon the subject; and, I am satisfied

1871.]

Opinion of the Court—Sawyer, J.

from the evidence, that the substance and its properties were, at the time of the shipment and explosion, almost wholly unknown to the public and to commerce; and further, that while the state of public knowledge was *not* such that the defendants were bound, or could be presumed in law, to know the existence or properties of the substance, I am also satisfied that they did not in fact, nor did any of their employees engaged in handling the case in question, have any knowledge on the subject; that the package was received and handled by the defendants and all in their employ, up to the time of the explosion, in utter ignorance of its contents, or the dangerous properties of the substance itself, had the contents been known, and that they had no ground to suspect its dangerous character—nothing to put them upon inquiry, as prudent men, as to what it was. I do not perceive that the fact of the arrival of the case on the sailing day of the steamer, and after its departure, or that it was not strapped or marked, as required by the regulations of the defendants, has anything in it to suggest to an ordinarily prudent man, engaged in the business of a common carrier, that the case contained anything dangerous. It was, at most, simply indicative that the party presenting it was not acquainted with the requirements of the company, which was, doubtless, no uncommon thing with those who were not in the habit of making frequent shipments. When the defendants' servant was requested to strap the case, he obtained a wooden hoop from a pile kept for the purpose, and the proper implements at hand, and strapped it, driving nails into the box with as much unconcern, as if it had been a case of boots and shoes. He evidently had no suspicion that it was liable to explode from the effects of his blows, or that it was in any respect dangerous; and the fact that hoops and implements were kept at hand for such purposes, indicates that this want of conformity to the regulations of the defendants was by no means singular—that such exigencies were anticipated, and provided for. The box appeared in all other respects in good condition and suitable for shipment—as much so as the thousands of others of a similar apparent character

Opinion of the Court—Sawyer, J.

[Jan.]

shipped by the same steamer. There was, then, in fact, no knowledge, and nothing that should necessarily excite the suspicions of a prudent man engaged in that business, and constantly receiving for carriage boxes of merchandise of similar appearance. Indeed, I think it would have been very remarkable, if one receiving and handling *so many* similar cases, upon the facts disclosed by the evidence, had suspected that it contained anything of a dangerous character.

It is insisted, further, by the plaintiff's counsel, that it was the duty of the defendants to acquaint themselves with the character of the merchandise delivered to them to be carried, and being bound to do so, they are chargeable with knowledge in fact; or that, at least, a failure to acquaint themselves with the character of the article to be carried is, of itself, such negligence as will render them liable. In my judgment, neither proposition is tenable. The numerous authorities cited to sustain these propositions, are cases where parties had sent valuable packages, or valuable articles in trunks as baggage, or frail goods requiring great care in handling, and cases of a similar character, and the party sending had either neglected, or upon request declined to inform the carrier of the character or value of the articles contained in such packages or trunks. The questions arose between the party sending and the carrier, in actions to recover for the loss or damage sustained in carrying. In none of these cases, which have fallen under my notice, has it been held that the carrier had an absolute right to know the contents of packages or baggage thus sent; but the consequence imposed on a failure of the owner to give the information when requested, or upon giving false information, is, that he shall not recover the extraordinary value of the articles lost, or for damage to articles requiring extraordinary care to prevent breakage or injury. I know of no case, in which it has been held, that a carrier has an absolute right to know the contents of a package tendered to him to be carried, or that imposes upon him a duty to make inquiry as to the contents of every package, without regard to circumstances exciting suspicion. In fact, the practice

1871.]

Opinion of the Court—Sawyer, J.

is usually otherwise, and bills of lading given to shippers by common carriers, often, if not usually, contain the clause, "contents unknown." (Abbott on Shipping, 339.) The ordinary bill of lading of the Pacific Mail Steamship Company, which brought the case in question for defendants (a copy of which was introduced in evidence), contains the clause, "contents unknown." If the inquiry were made, there is no certainty that the contents of a package would be correctly given. In all probability, the servant delivering packages seldom knows the contents himself. The only way to obtain evidence would be to open the package, and examine it. The carrier, certainly, would have no right to open every package tendered for carriage. And I apprehend a carrier would have no right to decline a package, on the ground that the owner refused to disclose the contents, unless there was some ground to suspect that it contained something dangerous, hurtful, offensive, or otherwise of a character not proper to be carried. In *Couch v. L. & N. W. Railway Co.* (11 Com., B. 255), which was an action for refusal to carry certain goods, the fifty-seventh plea to the first ten counts expressly set up as a defense, that defendant requested the plaintiff to inform it of the contents of the package tendered to be carried; that the plaintiff refused to give the information, and that defendant refused to carry it on that ground. (*Id.* 260.) The Court held the plea bad. JERVIS, C. J. said: "I am of opinion that the fifty-seventh plea is a bad plea. No authority has been cited to show that a carrier is in all cases entitled to know the nature of the goods contained in the packages which are tendered him to be carried; and there seems to be no good reason why he should be." * * "This plea founds itself upon the broad and general proposition, that whatever be the nature or quality of a package delivered to a carrier, he is not bound to receive it, unless informed of the description of its contents. That proposition involves consequences so highly inconvenient as, in my judgment, to require authority to sustain it. None has been shown." (*Id.* 291-2.) And MAULE, J., says: "To say that the company may in all cases insist upon being informed of

the nature and contents of every package tendered to them, as a condition of their accepting it, seems to me to be a proposition perfectly untenable. (*Id.* 295.) CRESWELL and WILLIAMS, J. J., express individually the same views. (*Id.* 297.) If the owner is not bound to state the contents of a package under all circumstances, it follows that the carrier is not bound to ask the contents under all circumstances. He is only bound to make inquiries, when he is entitled to have them answered, or when he has ground to suspect that there is something wrong about goods tendered for carriage. Says LORD CAMPBELL, C. J., in *Brass v. Maitland* (6 El. & Bl., 2 Q. B. 482): "It would be strange to suppose that a master, or mate, having no reason to suspect that goods offered to him for a general ship may not be safely stowed away in the hold, must ask every shipper the contents of every package." If the carrier has reason to believe that the package contains anything dangerous, or not proper to be carried, he, doubtless, may refuse to carry it, unless the contents are disclosed, or he is satisfied as to its character. He may, in England, for a statute upon the subject expressly authorizes him to do so; but if he refuses to carry on that ground, he must allege and prove the reasonable ground, or he will fail in his defense. (14 Com. B., 291-2.) It is, however, the duty of the shipper, at least, if he himself has knowledge, to give notice of the dangerous character of any package delivered to a carrier, where the party receiving it may not, upon inspection, be reasonably presumed to know its character. There is an implied undertaking that they are not dangerous. (*Brass v. Mailland*, 6 El. & Bl. 470; *Farrant v. Barnes*, 11 C.B.N.S. 561; *Shearman & Redfield on Negligence*, Sec. 593; *Pierce v. Winsor et al.*, 2 Clif. 27.) But even in that class of cases, where the action is between the shipowner and the shipper, growing out of the contract of carriage, COMPTON, J., said in *Brass v. Maitland* (*supra*, 488), the count under consideration, "clearly falls within the principle of the case of *Williams v. East India Co.* (3 East. 192). In that case Lord Ellenborough remarks, in giving the judgment of the Court, on page 200: 'In order to make the putting on board wrong-

1871.]

Opinion of the Court—Sawyer, J.

ful, the defendants must be cognizant of the dangerous qualities of the article put on board;" and 492: "It seems very difficult to hold that the shipper can be liable for not communicating what he does not know." After suggesting some illustrations, he says: "Again suppose that there is a new article of commerce, which neither shippers nor ship-owners know to be dangerous; is the innocent shipper to be liable? Lord Ellenborough's dictum in *Williams v. East India Co.* (3 East. 192.), above referred to, would tend to show that knowledge of the party shipping is an essential ingredient." (*Id.* 491-2.) And these views seem to be approved by the Court in *Hutchinson v. Guion* (5 C. B., N. S. 163). Perhaps this is the true legal principle as between the shipper and carrier, when the shipper has *no means* of knowledge or *ground for suspicion*, as well as none in fact; but, otherwise the doctrine, I think, can hardly be maintained in the broad terms in which it is stated by the learned judge. But in either view, the reasoning applies with much greater force, as between the carrier who receives the package without knowledge, or possible means of knowledge, or reason to suspect its dangerous character, in the due and ordinary course of his business to carry for another, and a stranger who happens to be injured by it through a faultless accident occurring in the ordinary course of transit. Whatever the true rule may be as between the shipper and carrier, it seems reasonable that there should be no liability as between the carrier and the stranger, when both are equally innocent. As between carriers and strangers, between whom no privity exists, the carrier cannot be held to the same rigid rules of responsibility as those which apply to dealings between the shipper and carrier. While a man is so bound to use his own as not to injure his neighbor, this maxim does not make him an insurer of his neighbor's property against all accidents that may happen through his acts, but only requires of him reasonable care and precaution. I might as well here refer to *Pierce v. Winsor et al.* (*supra*) cited by plaintiff's counsel as a strong case in their favor. That was a case between the shipowner and a party who had char-

tered a ship for the voyage, and then put her up as a general ship. The ship was at the sole use and disposal of the charterer, and it was stipulated that their own stevedores should be employed by the owner. Some mastic put on board in casks escaped, ran together among other goods and hardened, damaging said goods. The owner, having paid to the owners the damages to the other goods, sued the charterer. This case, however, does not appear to be inconsistent with the views of COMPTON, J., in *Brass v. Maitland*, with the limitations before suggested in this opinion. Neither the owner nor shipper had actual knowledge of the liability of the mastic to do injury. Both being equally ignorant in fact, the liability was put upon the ground, that, although the shipowners and their employees had *no reasonable means during* the lading to ascertain the quality of the goods, or narrowly examine the sufficiency of the packing, the *shippers had such means*; and that it seemed expedient, that although in fact ignorant, the loss should fall on them rather than on the owners—on the party *having the means* of knowledge, rather than on the one *who had them not*. The case does not appear to me to be against the defendants in the case in hand. On the contrary, it recognizes the principle adopted in this opinion: that the carrier, in receiving goods for transportation, independent of any suspicious circumstances, has no means of knowledge of the contents and character of packages delivered to him for carriage. I think, therefore, that the defendants, without any ground of suspicion, as to the character of the contents of the case in question, had no means of knowing their dangerous qualities, and were not, as to the plaintiff—a stranger to the contract for carriage—bound in law at their peril to know their character. That they did not in fact know, and that they had no reason to suspect the dangerous character of the package, I am satisfied from the evidence, and so find the facts in the case to be.

For similar reasons, there was no negligence under the circumstances, in not inquiring as to the contents of the package. The defendants were acting in the ordinary course of their business. It was a culpable violation of duty on

1871.]

Opinion of the Court—Sawyer, J.

the part of the owner to deliver a dangerous article exhibiting no external indications of its real character, without informing them as to the danger. In the exercise of his lawful rights, every man has a right to act on the hypothesis that every other person will perform his duty and obey the law; and in the absence of any reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to a danger, which can only come to him through a disregard of law on the part of some other person. (*Jetter v. N. Y. & H. R. R. Co.*, 2 Keys R. 154; *Earhart v. Youngblood*, 27 Pennsylv. R. 332; *Deyo v. N. Y. Cent. R. R. Co.*, 34 N. Y. 10-11; *Curtis v. Mills*, 5 C. & P. 489.)

At this time there were regularly carried to California, by defendants, by each steamer, besides those carried to Panama, Central and South American ports, from four thousand to six thousand packages of a similar general external appearance. It would be unreasonable in the extreme, to expect them to know, or make inquiries as to the contents of each package. It is not the habit of ordinarily prudent men engaged in the business of common carriers to do so. No reasonable man would take such extraordinary precautions, and the law imposes upon carriers no such extreme degree of care. In *Shearman & Redfield on Negligence*, sec. 6, the rule of law is well stated, as follows: "The law makes no unreasonable demands. It does not require from any man, superhuman wisdom or foresight. Therefore no one is guilty of culpable negligence, by reason of failing to take precautions which no other man would take under the like circumstances. If one uses every precaution which the present state of science affords, and which a reasonable man would use under the circumstances, he is not held responsible for omitting other precautions which are conceivable, even though, if he had used them, the injury would certainly have been avoided." "In determining what is negligence, regard is to be had to the growth of science, and the improvement in the arts which takes place from generation to generation; and many acts or omissions are now evidence of gross carelessness, which a few years ago would not have been culpable at all; as many acts are now consistent

with great care and skill, which in a few years will be considered the height of imprudence." (*Id.* sec. 7.) Having, then, no absolute right to know the contents of packages delivered for carriage, and there being no reasonable ground, to believe, that the case in question contained anything dangerous; and it not being the practice of ordinarily prudent men engaged in the business of carriers to ascertain the character of all goods carried; and having a right to rely upon the presumption that no breach of duty would be committed by the shipper, by delivering a highly dangerous package without giving notice of its character; there was no negligence on the part of the defendants in omitting to ascertain the contents of the case in question.

And for similar reasons, there was no culpable negligence on the part of defendants in opening the case with a mallet and chisel, in the mode pursued in this instance, for the purpose of ascertaining the extent of the damages. This was the ordinary mode of opening boxes of an apparently like character. It was opened in the presence of a representative of both the steamship company and the express company, in the regular course of business, when it is found that a package has been damaged in order to ascertain both the extent and character of the damage, and which party is responsible. The parties engaged were wholly ignorant of the character of the substance with which they were dealing. At that time there was no oil known to commerce, or commonly known to be an article of practical utility, or known to defendants or their employees, which would explode by percussion or concussion. The oil which leaked out had the general appearance of sweet or salad oil, which as also any other oil known to commerce, would have been perfectly innoxious under similar treatment. The box was manipulated in the presence of Mr. Knight, the second in authority in the management of defendants' business on the Pacific Coast, and of two others of the principal clerks of the two companies, and other employees, acting under their direction. They, as well as those who received the package in New York, who unloaded the package from the ship, those who tumbled it about on the wharf, and carted it to

1871.]

Opinion of the Court—Sawyer, J.

the premises in question on a dray, acted in all respects as men ordinarily would act, who are unconscious of danger, and as no man of common sense having reason to apprehend danger would have acted. They forfeited their own lives as the penalty of their faultless ignorance. Yet they acted as any other men of ordinary prudence, or even of extreme prudence, with the same knowledge, or means of knowledge, or want of reason to apprehend danger, would have acted—as any man of prudence would have acted under the same circumstances. It would not have been negligent to have opened the case of silverware, having a somewhat similar appearance, which was also saturated with oil, as the result shows, from the leaking case, and which was sent up with the latter for a similar examination, or, so far as is known, any of the other four or five thousand packages received by the same steamer. Yet there was no more ground for believing this package to be dangerous than any of the others. That it was not legal negligence to thus handle the package, under the circumstances, is recognized by the case of *Pierce v. Winsor et al.*, already noticed, cited by plaintiff. Says Mr. Justice CLIFFORD: “The stowage of the mate was made in the usual way; and it is not disputed it would have been proper, if the article had been what it was supposed to be when it was received and laden on board. Want of greater care in that behalf is not a fault, because the master had no knowledge, or means of knowledge, that the article required any extra care or attention beyond what is usual in respect to other goods.” (2 Clif. 27.)

These observations precisely fit the circumstances under consideration.

This being the case, there was, in my judgment, no negligence under the circumstances—nothing that the law deems negligence, and there was no liability to strangers for the consequences of the unfortunate accident. If defendants are liable under the circumstances, I do not perceive why they would not have been liable if they had made careful inquiry, and had been solemnly assured that the case contained olive or sweet oil, or some other harmless

merchandise, and had relied on that assurance. To hold them liable upon the case supposed would be unreasonable and abhorrent to all ideas of justice. I think that, while the defendants will be obliged to bear the loss sustained by themselves, resulting from the deplorable accident, except so far as they may have a remedy against the guilty shipper, the plaintiff, also, will be compelled to submit to the loss sustained by him from the same lamentable cause. It is one of those misfortunes which are liable to occur in human affairs, wherein those upon whom the consequences chance to fall, must be the ones to suffer, unless they can find a remedy against those who are really culpable.

The plaintiff also insists, firstly: that the accident is of a class where the event itself makes out a *prima facie* case of negligence, and throws the burden of proving due care and circumspection on the defendants; and secondly: that every man is presumed to do his duty and conform to the law; that under this rule it must be presumed that the shipper in this instance performed his duty, and informed defendants of the dangerous character of the article, and that, although it required the proof of a negative, the burden of showing want of knowledge was thrown upon them.

I am not prepared to admit the correctness of, at least, the first proposition, whatever may be the rule as to the second. But under the view I take of the evidence, it is wholly unnecessary to controvert either position; for, conceding them to be correct, in my judgment the evidence on both points clearly overthrows the assumed presumption in favor of the plaintiff, and shows that there was no negligence on the part of defendants, or their servants, and that the dangerous character of the package was not communicated to them, and that there was nothing to excite even the suspicion of a reasonable man. The package was received when accepted by the freight-measurer, O'Leary, and the tally clerk, Middlebrook, in the mode stated in the findings, and from that time it went into the great mass of freight, and no further special notice was taken of it. The receipt given by Middlebrook, although but a temporary receipt, was the original receipt, from which all subsequent ones

1871.]

Opinion of the Court—Sawyer, J.

were made up. The general receipt, way bill, and bill of lading clerks made out their papers from this, without seeing or inspecting, or having any opportunity to inspect the merchandise. This receipt was their only guide. And proof of all that took place at the time of the delivery was given.

It is sometimes necessary to prove a negative, although from the nature of things, this is usually difficult, and for this reason, plenary proof of a negative is not always expected, or required. (1 Greenl. Ev. sec. 78; *Kohler v. Wells, Fargo & Co.*, 26 Cal. 611-12.) But in this case, the proof on those points is, to my mind, full and entirely satisfactory.

Fully impressed with the importance of this case, both in view of the large amount of damages claimed and of the important principle involved applicable to many other actions, which, I am informed, are pending in this State and elsewhere, arising out of the same and other similar accidents, I have given to it such thought and attention as my other onerous duties have allowed me to bestow; and the conclusion to which my mind is brought, is, that the defendants are liable for the injuries to the premises demised to and occupied by themselves, but are not liable for the injuries resulting to the premises occupied by Bell and the Union Club. This is the first case decided, so far as I am informed, arising out of these accidents, involving the points now determined. And no case involving the exact point has been brought to my attention. Should it turn out that my conclusion is wrong, I am glad to know that there is a tribunal which can, and will, correct my error. I have taken care to frame the findings in such a way that, if I have erred in my legal conclusions, on either branch of the case, the appellate Court will have the means of correcting the error by directing the proper judgment upon the facts found, without ordering a new trial.

As to the premises occupied by Wells, Fargo & Co., the statute provides that, in an action for waste, "there may be judgment for triple damages." (Prac. Act, sec. 250.) As I understand this provision, it leaves the question as to

whether the damage shall be tripled to the sound discretion of the Court, to be determined according to the greater or less aggravating character of the circumstances. There are no circumstances in this case to justify inflicting damages beyond the actual amount sustained. In point of fact, the defendants repaired a large portion of the premises to the satisfaction of the plaintiff, and paid the expenses themselves, and supposed they had done so as to the whole; but it turns out in the evidence that a small portion of the expense of repairs, which, from the nature of the case, could not well be made except in connection with repairs made to other premises which defendants, according to the view taken, are not liable to repair, have been overlooked, and accordingly not been paid. For this amount the plaintiff must have judgment.

Let judgment be entered for the plaintiff for the sum of one thousand seven hundred and eighty-seven dollars and sixty-two cents, and interest at ten per cent. per annum, from August 1st, 1866, in gold coin, and costs of suit.

THEODORE LE ROY v. JOSE A. CHABOLLA *et al.*

CIRCUIT COURT, DISTRICT OF CALIFORNIA,
JANUARY 28, 1871.

1. STATUTE, CONSTRUCTION.—Where there are several statutes relating to the same general subject matter, and the meaning of the last is doubtful, they should all be examined together, and considered in connection with the circumstances which led to their passage, in order to ascertain the probable intent of the Legislature in respect to the doubtful point.
2. STATUTE CONSTRUED.—Section seventy-three of the Act of the Legislature of the State of California, to “Reincorporate the City of San José,” does not confirm, or render valid, the Sheriff’s sale of all the public lands of the Pueblo of San José, made in May, 1851, or the release of the title to said lands by the corporation to the purchasers thereunder, attempted to be made by an ordinance of the Common Council of the City of San José, approved November 10, 1851.

Before SAWYER, Circuit Judge.

1871.]

Opinion of the Court—Sawyer, J.

Ejectment. The facts sufficiently appear in the opinion. Action tried by the Court without a jury, the parties having duly waived a jury.

Moultrie and J. B. Felton, for plaintiff.

F. Spencer and J. A. Yoell, for defendants.

SAWYER, Circuit Judge. This is an action against some four hundred and fifty defendants to recover a large portion of the city of San José and of the county of Santa Clara. The case is, therefore, one of great importance. The question presented is, whether section seventy-three of the Act of March 17, 1866, to "Reincorporate the city of San José," properly construed, confirms and renders valid, the confirmation of Sheriff's sale, and release of the corporation to the purchasers thereunder, of all the public lands attempted to be made by an ordinance of the Common Council of the city of San José, approved November 10, 1851, mentioned in the agreed statement of facts. If not, then there must be judgment for the defendants; for the plaintiff's title depends upon this provision of the statute. In order to give a proper construction to this section, it will be necessary to consider the condition of things upon which the act was intended to operate, at the time of its passage. On the twenty-eighth of May, 1851, all the Pueblo lands of the city of San José, being many leagues in extent, were sold by the Sheriff of Santa Clara county in one parcel, and at one bid, under an execution issued upon a judgment against the Mayor and Common Council of the City of San José, which municipal corporation had succeeded to the interest of the Pueblo. On the twelfth of June, 1851, the Mayor of San José, assuming to act on behalf of the city, in pursuance of a resolution of the Common Council, signed a contract with representatives of the purchasers at said sale, as parties of the first part, under which sales of said land were to be made, and after paying the amount of the judgment, expenses, etc., the proceeds divided in a certain designated proportion between the parties and the city; and by the provisions of said contract, the parties of the second

part (the Mayor and Common Council) ratify and confirm the said Sheriff's sale, and release to the said purchasers thereunder, the interest of the City of San José in said lands. Said ordinance purported to ratify and confirm said contract, and authorized the Mayor to sign any deeds, or contracts, necessary to carry it into effect. Between the said twelfth day of June, 1851, and the twenty-first of April, 1858, the representatives of said purchasers at Sheriff's sale, and the Mayor of said city, in pursuance of said agreement or ordinance, etc., sold and conveyed to private parties, tracts of said land, in number more than fifty, and in the aggregate amount, more than five thousand acres. And between said dates last named, said representatives of the purchasers alone conveyed other tracts of said lands, amounting in the aggregate, also, to more than five thousand acres. Subsequently, in 1864, it was held by the Supreme Court of the State that the said Sheriff's sale, contract, ordinance, etc., and the titles derived thereunder, were absolutely void; and that the title of the City of San José to the Pueblo lands was in no way affected thereby—the Supreme Court affirming the judgment of the District Court rendered therein early in 1852. But the principles upon which the determination rested had been long before settled by the Supreme Court in other cases. On the twenty-first of April, 1858, the Legislature passed an act authorizing the funding of the floating debt of the City of San José, and to provide for payment thereof. By section ten of this act the Board of Trustees of the City of San José were required to convey to the Commissioners of the funded debt provided for in the act, all the lands and right in and claims to the same held or owned by the former Pueblo de San José, to be held in trust for payment of said debts, and authorized them to sell and convey the same for said purposes, in such manner as they should deem the interests of the city to require. In pursuance of this act, on the fourth of August, 1858, the city, by its proper officers, conveyed all said Pueblo lands to said Commissioners. The said Commissioners of the funded debt, between the last named date and January 17, 1866, in pursuance of the

1871.]

Opinion of the Court—Sawyer, J.

provisions of said act, executed and delivered more than four hundred deeds to private individuals in severalty, of lots within and lands without the city limits, amounting in the aggregate to more than twenty-five thousand acres of said Pueblo lands, and their vendees went into possession thereof. So, also, at divers times between March 27, 1850, and the said April 21, 1858, the Mayor and Common Council of San José, by ordinances and deeds of conveyances, conveyed in fee to various individuals, small lots and tracts of said lands, to the number of more than fifty, and amounting in the aggregate to more than fifteen hundred acres of land. On January 17, 1866, all the debts of said city existing on said April 21, 1858, had been paid off by said Commissioners, and, on that day, the Legislature passed an act reciting said fact of payment, and abolishing said commission. Said act provided that said Commissioners should reconvey to the Mayor and Common Council of San José all said Pueblo lands not already sold to private parties by said Commissioners, and then authorized the Mayor in such manner as the Common Council should direct to sell and dispose of all said lands, and invest the proceeds in certain bonds mentioned, for the benefit of the public school fund of said city. In pursuance of the provisions of said act, said Commissioners did, on the twenty-sixth day of January, 1866, reconvey to said Mayor and Common Council of San José, all of said Pueblo lands before conveyed to them as before stated, not sold by them to private parties; and at the time of said reconveyance there remained of said lands, which had not been sold or otherwise conveyed or disposed of by said Commissioners, more than thirty thousand acres. This being the condition of affairs March 17, 1856, on that day the Legislature passed the said act to reincorporate the City of San José, the seventy-third section of which is the one to be construed. It provides that "All lots known as the school lots, and all lots and lands either within or without the corporate limits of the City of San José, dedicated and belonging to said city not hitherto disposed of by ordinance, or sold, and by deed transferred to individual purchasers, either by the Common Council or by

those acting as Commissioners of the funded debt of said city (and which sales and transfers are hereby declared valid), are hereby fully vested in the Mayor and Common Council of said city in trust for the use and benefit of the public schools of the city of San José; and the Mayor and Common Council are hereby authorized to sell, transfer or exchange the same for other lots and lands, if in their opinion the interests of the public schools will be best secured by so doing; and all money received from such sales shall not be diverted from the School Fund of said city" (Stat. 1865-6, p. 268, sec. 73). This provision and the several other acts of the Legislature referred to relating to the Pueblo lands, are *in pari materia*, and should be read together in order to get at the intention, if the construction of the latter provision can be regarded as doubtful. Did the Legislature mean by the terms, "not heretofore disposed of by ordinance," to include the said ordinance of November, 1851, by which the Sheriff's sale was attempted to be confirmed? If so, then they might have said so in terms about which there could be no doubt, and have stopped there, for there would have been nothing more to say. There would have been no other lands for the statute to operate upon; and all the other provisions would have been useless. If it was intended to make the disposition attempted by that old ordinance valid, it took all the Pueblo lands, and went behind all their subsequent sales and transfers. The truth is, that all the legislation on the subject of the Pueblo lands had therefore gone on the assumption that those transactions in 1850 were utterly void, as they in fact were, and have so been held by the highest Court of the State. The Legislature of 1858, which passed the Funding Act, acted upon that hypothesis. It wholly ignored the existence of those early void acts, and proceeded upon the idea that the Pueblo lands were still owned by the city of San José. When it established the Fund Commissioners and provided for funding the debt of the city existing prior to April 21, 1858, it set apart all these Pueblo lands as a fund for securing the payment of said debt, and provided that the city authorities should convey the lands to the

1871.]

Opinion of the Court—Sawyer, J.

Fund Commissioners for that purpose, and authorized and required said Commissioners to sell them for the purposes of the trust. And the said Commissioners did proceed to execute this trust, and so managed the affairs under the law that, in the course of eight years, during which time they had sold more than twenty-five thousand acres of the same lands to private parties, who settled on and occupied them, they paid off the entire debt, and the object of their trust was fully accomplished.

The Legislature, in January, 1866, again legislated upon the subject, wholly ignoring the transactions of 1850, and in an Act reciting the performance, by the Commission, of the trust, abolished the Fund Commission, for which there was no further use, and directed the Commissioners to reconvey the pueblo lands yet unsold, of which there were more than thirty thousand acres left, to the City of San José, and provided that the Mayor should sell them, etc., and invest the proceeds in certain bonds for the use of its public schools. It deals with these lands in all respects as if they still belonged to the city. Again, the Legislature deals with the subject, as it necessarily must do, in the act under consideration, to reincorporate the city. It is the same Legislature that passed the act of January 17, 1866, and it was at the same session. They do not return to this subject as a special subject of legislation, but they necessarily have to deal with it as incidental to another act of legislation. Do they indicate any change of purpose? None at all, for in this seventy-third section, they still provide that all lands—and there are none other—are hereby fully vested in the Mayor and Common Council of said city, in trust for the use and benefit of the “*public schools of the city of San Jose*”—the same as provided in the act passed at the same session two months before. It was not its purpose, to take them from the public schools and give them to parties, who set up a void claim to them, which arose some sixteen years before. If the construction claimed for the provision is to be sustained, this plain intention would be wholly subverted, and by far the largest portion of the provision would have nothing upon which to operate.

Opinion of the Court—Sawyer, J.

[Jan.]

Whereas, by reading the section in connection with the prior acts, and the proceedings under them, and considering it in connection with the intention before expressed, and the condition of things existing at the time, every word can have effect, and such effect will be in exact harmony with the prior action of the Legislature. It was, in my judgment, only intended to carry out to its results the policy before adopted, and to validate such acts as might be thought to have been irregularly performed in carrying out that policy, and to confirm such disposition as the Mayor and Common Council had made by ordinance and conveyance in the ordinary course of the administration of the city affairs, in harmony with the Legislative policy before adopted. I cannot think it was designed to subvert its prior policy, or to vivify an old, void, extraordinary and probably long-forgotten, claim, so out of harmony with all prior legislation, and the other provision of the same act. To give the provision such a construction as is claimed by the plaintiff, would, in my judgment, lead to inconsistent, not to say absolutely absurd results.

Upon this view, the plaintiff has no title, and it is unnecessary to examine the other questions discussed.

The lands so conveyed to the city of San José by said Commissioners, have since this reconveyance and before the commencement of this suit, been conveyed in small parcels, by the Mayor and Common Council of said city, to divers private parties, in pursuance of said act of March 17, 1866, and many of the defendants hold under said conveyances. In my judgment, plaintiff has shown no title.

Let judgment be entered for defendants, with costs of suit.

1871.]

Opinion of the Court—Deady, J.

THE CALIFORNIA.

DISTRICT COURT, DISTRICT OF OREGON,
JANUARY 28, 1871.

1. **IN ADMIRALTY.—ANSWERS.**—The general answer in admiralty should be pertinent and responsive to the narration or allegations in the articles of the libel, and if the response is not full, explicit and distinct, exceptions for insufficiency lie to compel a sufficient answer.
2. **SAME.**—But if the answer is responsive to the libel, no exceptions will lie to it, on the ground that it is not a defense to the suit, whether the matter is impertinent or not.
3. **EXCEPTIONS.**—Exceptions in admiralty, nature and office of defined.
4. **IMPERTINENCE.**—It is impertinence to blend matter intended as a defensive allegation, with the response or answer to an allegation of the libel.
5. **HALF PILOTAGE LIEN ON VESSEL MAY BE ENFORCED IN ADMIRALTY.**—The State statute gives a pilot half pilotage as a compensation for tendering his services to pilot a ship out over the Columbia river bar, in case the same are refused: *Held*, that such a claim is a claim for pilotage, which, by the general maritime law, is a lien upon the vessel, and the same may be enforced by a suit in admiralty.

Before DEADY, District Judge.

William Strong, for libellant.*Joseph N. Dolph*, for claimant.

DEADY, J. This suit is brought by a Columbia river bar pilot, attached to the steam tug *Astoria*, to recover \$55.50 for half pilotage.

The libel, which was filed September 9, 1870, alleges that on August 7, 1870, the libellant was duly qualified, according to the laws of Oregon and the United States, as a bar pilot at the mouth of the Columbia river, and that the steamship *California* was then lying at the port of Astoria, bound outward to the foreign port of Victoria, without a pilot on board duly licensed under the laws of Oregon, and that libellant then and there offered his services to the master of said vessel to pilot her out of said river and over the bar thereof to the sea; and that said vessel then and there drew thirteen feet six inches of water, and that said libellant was entitled to demand and receive one half the pilotage allowed for taking a vessel across the bar, to wit:

\$4 per foot draft for the first twelve feet, and \$5 per foot for the excess, or the sum of \$55.50.

The amended answer of the North Pacific Transportation Co., claimants, filed November 28, 1870, is what may be called a general and special one. (2 Conkling's Ad. 235.)

In direct response to the allegations of the libel it sets forth:

First—That the respondent has no knowledge, etc., as to whether the libellant was qualified as a pilot as alleged in the libel; that it is true that the libellant hailed the vessel and offered his services as alleged, but that it is not true that libellant was the first pilot that offered his services “on that occasion,” or that there was no pilot on board said vessel at the time as in the libel alleged, “for the truth and fact was and is and respondent doth allege and propound “that one Hays was the first pilot that offered his services to the vessel on said August 7, and that said Hays was a duly qualified pilot and had a certificate from the Inspectors of Steamboats for the district of Oregon, authorizing him to pilot said vessel to the open sea; and that said Hays, as such pilot, had said vessel in charge at the time libellant hailed her, and thereafter on said day did pilot her across the Columbia river bar to the open sea.

Second—That it is true said vessel drew thirteen feet six inches of water, but it is not true that the libellant is entitled to demand and receive from said vessel or the master or owner thereof half pilotage or the sum of \$55.50 or any other sum.

In bar of the suit, the special answer alleges that the libellant ought not to have or maintain the same, because the claim of the libellant for half pilotage is based on the provisions of an act of the Legislative Assembly of Oregon, of October 17, 1860, and that the right to demand and receive half pilotage in the cases therein provided for, is limited to the master and consignee of the vessel, and the claim therefor is not thereby given against the vessel or made a lien thereon.

On December 3, libellant filed exceptions to the answer of the respondent, and on January 3, 1871, the same were argued by counsel and submitted.

1871.]

Opinion of the Court—Deady, J.

The exceptions are four in number, and seemed to have been framed upon the notion or idea, that if the matters contained in an answer in admiralty are insufficient as a defense to the suit, that exceptions for insufficiency will lie. But this is a mistake. At common law, in such a case, the party objecting to the insufficiency of the pleadings would demur. But in admiralty, as in equity, the answer of the respondent is literally his response or answer to the narrative or matters alleged in the libel or bill, or the interrogations appended thereto. If this is not full, explicit and distinct as to each separate allegation of the libel, it is said to be insufficient—not insufficient as a defense to the suit, but as an answer or response to the charges in the libel—and exceptions will lie thereto. If the exceptions are allowed, the judgment of the Court is, that the respondent make a further and better answer, which he may be compelled to do if he omits or refuses. (Ad. R. 27, 28.)

If, however, the answer contains matter not responsive to the allegations or interrogatories of the libel and not constituting a defense thereto, it is said to be impertinent or irrelevant, and may be excepted to on that account.

The first exception is somewhat peculiar, and it does not appear from the exception itself whether it is taken for insufficiency or impertinence. It is taken to the answer to the first article of the libel which, it is alleged, contains “*denials*” of the libellant’s cause of suit, and also an allegation of new matter as a defense thereto, when the same should have been stated separately. If the premises be correct, I suppose the exception is well taken for impertinence, for although the new matter be sufficient as a defensive allegation or peremptory exception to the suit, it is impertinent to blend and confuse it with the response to a particular article or allegation of the libel. When it becomes necessary to insert in the answer some matter which cannot be pertinently introduced as responsive to any allegation in the libel, such matter must be separately stated in an article framed after the manner of an article in a libel. Such an article is sometimes called a defensive allegation, and sometimes a peremptory or dilatory exception, as the case may

be, and is analogous to a plea in bar or to the jurisdiction at common law. (2 Conkling's Ad. 544; Ben. Ad. 250.)

Now, I do not perceive that any part of the answer embraced in this exception is not responsive and pertinent to the narration in the first article of the libel. The article states that on the voyage in question, that the libellant was the first pilot to hail the vessel and tender his services, and that at the time the vessel had no pilot on board. The answer, after contesting negatively that the libellant first hailed the vessel and that she was then without a pilot, affirms the fact to be that Hays, a pilot qualified as therein stated, was then on board and in charge, and piloted her to sea. Certainly this is responsive to the allegation, and answers it according to the fact, as the respondent asserts it to be. I know of no reason or rule by which a party is bound to rest his response to an allegation with a mere denial, when, as he conceives, the contrary is also true and material.

The second exception is taken to the matter of the answer, called "new matter" in the first exception, but for the reason that the same is not sufficient to constitute a defense to the suit. This exception, as well as the third and fourth, should have been taken, if at all, for impertinence or irrelevancy instead of insufficiency. As has been shown, exceptions for insufficiency are only to be taken when the matter excepted to is not a full, explicit and distinct response to the allegation or article of the libel which it professes to answer. But these exceptions, judging from the argument of counsel, appear to have been taken because, as the libellant says, the matter excepted to does not constitute a defense to the suit; in other words, it is impertinent or irrelevant.

But, as counsel for both parties have argued the exceptions as if they had been taken for impertinence, I will consider and dispose of the questions arising upon them accordingly; with leave to the libellant, upon payment of costs, to file exceptions for impertinence and irrelevancy as of the day when these were filed.

This exception is not well taken upon any view of the matter; for if the allegation does not constitute a defense to

1871.]

Opinion of the Court—Deady, J.

the suit, it is not impertinent, because in direct response to the first article of the libel.

The third exception is not well taken. The portion of the answer covered by it is in direct response to the second article of the libel. It admits the alleged draft to the vessel, but denies that libellant is entitled to receive half pilotage, or any sum, from the vessel, or master, or owner, as is alleged in the libel. This is too plain to waste words upon.

The fourth and last exception arises a question which was decided against the respondent in this Court in *The Wright* (Deady's Rep. 591). In view of the adverse decision, counsel for respondent has asked the Court to reconsider the question. His argument (which is not without force and plausibility) is, that the claim for half pilotage, on account of services tendered and refused, is given by the State statute, and that as such statute gives no claim or lien upon the vessel for such service, but limits the remedy of the pilot to the master, or in case of his default to his consignee, the vessel itself is not liable, and therefore this suit cannot be maintained. In support of his argument and illustration of the subject, counsel cited and commented upon (*The Mercer*, 1 Sprague, 284; *The Schooner Wave*, 2 Paine, 131; *The Pacific*, 1 Blatch. 569; *The Brig America*, 2 Am. Law Rev. 458.)

Sections 15 and 27 of the State Pilot Law (Or. Code, 842-3) provides, that the master of a vessel may pilot her in or out of the river "but he shall, notwithstanding, when bound into the river, pay to such pilot as shall first offer his services outside of the bar, full pilotage, * * * and if bound out, one-half pilotage. If the master omit or refuse to pay the pilotage fees in any instance * * * then his consignee shall become liable for the same."

In the absence of legislation by Congress, the State has power to regulate the subject of pilotage, and in the exercise of that power may prescribe the qualifications of the persons who may perform that service—what compensation they shall receive, and under what circumstances an offer to pilot a vessel shall be equivalent to performance, and thereby give the pilot making such offer a right to compensation as pilotage. (*Cooley v. Board of Wardens*, 12 How. 311.)

The fourteenth Admiralty rule authorizes a suit to be brought against the vessel for pilotage. Claims for pilotage are cases of Admiralty jurisdiction. (Ben. Ad. 289, 391.)

The offer to pilot a vessel under certain circumstances is declared by the State statute, so far as the right to compensation is concerned, to be equivalent to performance, and the Supreme Court in *Cooley v. Board of Wardens*, cited above, has decided such a statute to be a reasonable and valid regulation of the subject of pilotage. This being so, then a claim for compensation for services tendered and refused is a claim for pilotage, and therefore a lien against the vessel which may be enforced by a suit in Admiralty.

In *Steamship Company v. Joliffe* (2 Wal. 457), it was held, under similar circumstances, that the law implied a contract in favor of the pilot to pay half pilotage as a "compensation for the exertion and labor made by the pilot, and the expenses and risk incurred by him in placing himself in a position to render the service, which, in the majority of cases would be required." The case of *The Brig America*, cited above, is the latest authority cited on the subject. The case arose in the district of Massachusetts—the right to sue the ship for half pilotage, because of services tendered and refused, was maintained by the Court. True, the State statute in that case expressly gave a lien upon the vessel for the amount, and upon that ground it was sought to distinguish the case from *The Mercer*, decided otherwise in the same Court some years before, when the statute did not give such lien. But it is manifest that Mr. Justice Lowell in *The America*, does not rest the right to sue the ship upon the fact that the State statute gave the pilot a lien, but also and independently of such statute lien, upon the general rule of the maritime law, which gives the pilot a lien upon the ship for services rendered, either in fact or contemplation of law. He says:

"It has never been decided that, in the case of a contract confessedly maritime, and which by the general maritime law would give rise to a lien, the remedy in Admiralty would be taken away by the new fact, that the duration and extent of the lien may have been lawfully regulated by

1871.]

Opinion of the Court—Deady, J.

State legislation. Such is the case. The general maritime law recognized in the fourteenth Admiralty rule, gives pilots a lien upon the ship; the State has the right to regulate the subject matter, and declares that a pilotage contract is complete when a due demand has been made and rejected; can there be a doubt that the pilot thereupon has a lien upon the ship, by the general maritime law, to enforce this valid contract? If so, he surely does not lose it, because the State tries to help him to it. If he does, then he must equally lose his lien for pilotage actually performed; for they stand on the same foundation, and are given by the same clause of the statute. My opinion, therefore, is, that, as this case comes within the fourteenth rule, * * * this Court has jurisdiction to enforce a State lien; and if this were not so, that a lien is implied or results from a valid contract for pilotage, unless, as in the case before Judge Sprague (*The Mercer*), the law expressly or by implication denies it. Taken either way, there is a lien which gives the right to proceed here against the vessel."

But I do not admit the conclusion which may be drawn from a remark in the foregoing quotation, that a State in the exercise of its permitted power to regulate the subject of pilotage, could deny a pilot a lien upon a vessel for his services, contrary to the general maritime law, and thus deprive the Courts of Admiralty of jurisdiction of suits *in rem* to enforce claims for pilotage.

Nor, if such power were to be admitted, do I construe the Statute of Oregon giving half pilotage, either from the fact of its silence upon the subject of a lien for pilots' services, or because it gives the contingent and cumulative remedy against the consignee, as impliedly denying a lien for pilotage. The true view of the matter, it seems to me, is, that the State law creates the debt, demand or claim for half pilotage on account of services tendered the ship and refused, and implies a contract to pay for the same whatever the statute allows and prescribes; and that a valid, legal claim for pilotage being thus established, it comes within the rule of the maritime law, and becomes a lien upon the ship for which a suit in Admiralty may be maintained.

THE COLE SILVER MINING COMPANY v. THE VIRGINIA
& GOLD HILL WATER COMPANY *et al.*

CIRCUIT COURT, DISTRICT OF NEVADA,
FEBRUARY 13, 1871.

1. **PARTIES TO BILL BEFORE SERVICE.**—A person residing out of the jurisdiction of the Court, though named as defendant in a bill, is, substantially, not a party to the action, till service of process or appearance.
2. **EFFECT OF OMISSION ON JURISDICTION.**—Whenever the making of a person a party to a bill would oust the jurisdiction of the Court, as to other parties, such person, if not an indispensable party, may be omitted, for the purpose of exercising jurisdiction, as to other parties, whose rights can be determined without his presence.
3. **JOINT TRESPASSER OMITTED.**—In an action to restrain the diversion of water by tort-feasors, one of the tort-feasors, who resides out of the jurisdiction of the Court, may be omitted.
4. **AMENDMENT.—INJUNCTION.**—The Court may permit an amendment to a bill, by omitting a non-resident, named thereon as defendant, but not served, without prejudice to a motion for injunction.
5. **INCAPACITY OF CORPORATION NO DEFENSE TO TRESPASS.**—In an action by a corporation for injuries to property in its possession, the Court will not, at the instance of the wrong-doers, enter into any inquiry as to the legal capacity of such corporation to hold the property.
6. **WRONGFUL DIVERSION OF WATER.**—Plaintiff, in excavating a tunnel in a mountain to its mining claim, on the public lands of the United States, struck a subterranean flow of water, which it appropriated and enjoyed for several years. Defendants ran a tunnel from a distant point into the mountain, to a point some thirty feet in altitude, directly below the point where the plaintiff obtained the said water; and, thereupon, the water, which before flowed through plaintiff's tunnel, was intercepted and discharged through defendants' tunnel, and by them appropriated to their own use: *Held*, that said diversion and appropriation of the water was wrongful, and that complainant was entitled to an injunction.
7. **PRELIMINARY MANDATORY INJUNCTION.**—Where defendants, by means of a tunnel run into a mountain at a lower altitude than complainant's tunnel, wrongfully intercept water appropriated by complainant, flowing in its said tunnel, and divert it therefrom, a preliminary injunction will be granted, restraining the continuance of said diversion, even though an obedience to the injunction should render it necessary for defendants to build a bulkhead, or dam, across the tunnel.

Before SAWYER, Circuit Judge.

APPLICATION for preliminary injunction heard on bill and affidavits. Complainant is a corporation, organized for the

1871.]

Statement of the Case.

purpose of mining for silver. Its grantors took up a ledge supposed to contain silver ores, situate on the side of the mountain, above Virginia City. Complainant excavated a tunnel, commencing in a ravine some distance below the croppings of its ledge, on the surface of the mountain, and extended it into the mountain to and through its ledge at a considerable depth below the surface. In excavating the tunnel, complainant struck a seam in the rock, from which flowed a stream of water, which it claimed, and appropriated, in accordance with the custom in force. The water so discovered and appropriated, the complainant leased to the Virginia and Gold Hill Water Company, a corporation organized to supply water to Virginia City and Gold Hill, one of the defendants, upon certain designated terms. Said Water Company paid the stipulated rents, and enjoyed the water under said lease for the agreed term. The water was conveyed to Virginia City, and sold to the people for various domestic and other uses. Other parties, also, took up sundry ledges or mining claims on the same mountain. Some claimed to be in front, and some in the rear, of complainant's ledge. Some of the claimants started a tunnel to run to their ledges, commencing lower down the mountain, and at a considerable distance to the southward of the entrance to complainant's tunnel. The excavation of this tunnel, called the Nevada Tunnel, was prosecuted at times, and the work suspended at times, for several years. Finally the said several defendants, some of whom had acquired a portion of the interest of the original parties in said Nevada Tunnel, entered into a contract to extend the said tunnel into the mountain, till they should strike the ledge, called the Macey Ledge—the location of which is left very much in doubt by the affidavits, but it cannot be west of or beyond complainant's ledge—or till they should strike water.

It is unnecessary for the purpose of illustrating the points decided to specify the terms of the contract, or to state more specifically the facts. Under this contract the defendants continued to excavate said tunnel in such a line as to strike a point at a lower altitude, directly below the point where complainant discovered and appropriated the water in its

tunnel; and they so timed it, that they reached the said point not far from the time when said lease from complainant to the said defendant, the Virginia and Gold Hill Water Company, expired. The complainant insists that defendants extended the said tunnel expressly to take this water; and the defendants, that their object was to prospect ledges lying in the rear. But it did not appear to the satisfaction of the Court, that the claim to any ledge mentioned lying *in the line of the tunnel* to the west or rear of complainant's ledge was located prior to the location of complainant's claim. When the defendants were approaching the point under complainant's tunnel, the complainant filed a bill in this Court, stating what it claimed to be the facts; that defendants were running to the point referred to for the purpose of cutting off its water; that they would soon reach the water and intercept it, and prayed an injunction to restrain them from proceeding further. While the motion for injunction was pending, the defendants reached the point, and the water, thereupon, ceased to flow in complainant's tunnel, and was diverted through defendant's said tunnel, and appropriated by them. Thereupon, the five years mentioned in said lease having expired, complainant dismissed its first bill and filed this bill, setting up the new facts, and applied for an injunction to restrain the continuance of said diversion till the final hearing. The value of the water is alleged to be two hundred dollars per day. Since the diversion, it has been taken by defendants at the mouth of their own tunnel, and conveyed to Virginia City for sale as before.

The foregoing is a sufficient summary of the facts, as they appear in the bill and affidavits, to explain the points of the decision, without being more specific.

Mitchell & Stone and S. W. Sanderson, for complainant.

R. S. Mesick, for defendants.

SAWYER, Circuit Judge. As to the question of jurisdiction, the defendant, Glauber, has never been served, and he has not appeared. The bill shows that he is a resident of

1871.]

Opinion of the Court—Sawyer, J.

California, so that he cannot be served, and the Court cannot acquire jurisdiction of him in the action unless he voluntarily appears. Although named in the bill, with a prayer that process issue, and he be made a defendant, yet, he is, substantially, not a party to the action until he is served, or till he appears.

The twenty-second and forty-seventh equity rules do not seem to contemplate that a person can be a party, in fact, till service or appearance. At all events, under these rules, when the making of a person a party—unless he is an indispensable party—would oust the jurisdiction of the Court as to other parties, he may be omitted for the purpose of exercising jurisdiction as to those other parties, whose rights can be determined without his presence. (*Shields v. Barrow*, 17 How. 141.)

Upon the omission of Glauber the Court would have jurisdiction over all the other parties and their rights as against the complainant, may be determined without his presence. The acts complained of are *tortious*, and the cause of action is *several*, as well as joint. I do not think Glauber an indispensable party to the action. While the decree will finally settle the rights of the parties before the Court, it will not bind him, and he may still litigate his claim with the complainant in another action, or he may voluntarily appear in this; for it is not to be presumed that he is in fact ignorant of the pendency of the suit. If Glauber is an indispensable party, it will be impossible for the Court to restrain the commission of waste; the working or destruction of a mine; the diversion of water; the flooding of an upper riparian proprietor, or the erection or continuance of any nuisance, however offensive, dangerous, or destructive to the rights of another, when the wrong-doer has an associate or confederate residing out of the jurisdiction of the Court, or when the tort-feasor himself keeps beyond the jurisdiction of the Court, and performs the tortious acts through his agents and servants. It is notorious, that in the mining regions of Nevada, Oregon and California, and all the mining territories, many trespasses and wrongs of the kind mentioned, requiring the

almost daily interposition of the Courts, are perpetrated by parties having associates residing in other States. To deny relief against wrong-doers in such cases in this circuit, on account of the absence of one tort-feasor, would be to paralyze the right arm of the Court in those cases wherein its effectual interposition is most imperatively demanded, and most frequently invoked. Let it be once established that the Courts cannot interfere, or grant relief in the absence of one of the joint tort-feasors, and the mining interests of all the gold and silver producing States will, thereafter, be at the mercy of any bad men, who, relying upon a confederate beyond the jurisdiction of the Court to enable them to evade all redress for injuries committed, may choose to combine for the purpose of wrongfully availing themselves of the labors and discoveries of others. In my judgment, in such cases it would be far more equitable to compel the absent tort-feasor to appear and defend his right, or submit to any inconvenience that may incidentally result from the execution of any decree entered against his co-trespassers, rather than deny all redress, no matter how grievous, to the injured party, because one of the wrong-doers withdraws and keeps himself beyond the jurisdiction of the Court. In the one case the absent party may appear and have his rights adjudicated, if he so desires, and justice will be awarded to all; while in the other, the most grievous injuries *must necessarily go wholly unredressed*.

For example, can the Courts of the United States properly refuse to redress clearly manifest injuries to its own citizens, by restraining the working of a gold or silver mine, waste, or the erection or *continuance* of a nuisance, because a citizen of Great Britain, residing in England, is interested in the profits of the wrong, or himself, safe in his retreat beyond the jurisdiction of the Court, perpetrates it by means of his agents, servants and employees? The Court, in such instances, must, from the necessity of the case, assume jurisdiction and proceed to a decree as to the parties before it, or sit helplessly by and permit an absolute failure of justice, by suffering our own citizens to be ruined with impunity by irresponsible, non-resident wrongdoers, or by parties in collusion with them.

1871.]

Opinion of the Court—Sawyer, J.

On this principle of preventing a failure of justice, and even on grounds of convenience, courts of equity have often dispensed with parties interested in and affected by the suit, in cases calling far less loudly for such action, than the class of cases to which this belongs. (*Smith v. Hib. Mine Co.*, 1 Scho. & Lef. 240-1; *Rogers v. Linton*, Bunbury, 200, 201; *Attorney-General v. Balioe College*, 9 Mod. 409; *Thompson v. Topham*, 1 Younge & Jer. 556; *Cockburn v. Thompson*, 16 Ves. 326; *Williams v. Whingates*, 2 Bro. Ch. 399; *Walworth v. Holt*, 4 Myl. & Cr. 635-6; *Taylor v. Salmon*, Id. 141-2; *Harvey v. Harvey*, 4 Bev. 220-2; *Reynolds v. Perkins*, Amb. 565.)

In my apprehension, it is no good answer to say, that the injured party may have his remedy in the State Courts, where service may be had on non-resident defendants by publication of summons. The constitution and the laws entitle parties in certain cases to seek redress in the National Courts, and the class of cases mentioned, is the very one in which the remedy in the National Courts is most valued by litigants, and in this circuit most frequently sought. Besides, it is a mere accident if the State laws admit of acquiring jurisdiction in this mode. I doubt whether many of the States, if any, east of the Rocky Mountains, authorize a publication of summons at all, in that class of cases. If they do, when an action is commenced in a State Court by a citizen of the State, and all the defendants are citizens of another State or foreigners, it is their absolute right to have a transfer to the National Courts, and a transfer by the defendants served in the State would oust the jurisdiction, if any defendant should be a non-resident; for, in the National Courts service by publication could not be recognized. Thus there would still be an evasion of the remedy and a failure of justice.

To my mind there is an obvious distinction between torts of the class to which this action belongs, wherein the injury and right of action are *several* as well as *joint*; and actions of partition, for the cancelling of contracts, settlement of partnership affairs, and the like, wherein the decree is not binding even on the parties before the Court in

the absence of a party in interest. Such were the cases of *Shields v. Barrow*, 17 How. 139, and *Barney v. Baltimore City*, 6 Wal. 280.

In *Marker v. Marker*, a tenant under a claim of right, had sold to a stranger a large quantity of timber still uncut and standing on the premises occupied by him. A bill was subsequently filed to restrain the vendor from cutting the timber, in order that he might fulfill his contract of sale, but without making the purchaser a party. On objection for want of parties, the Court held that the purchaser was not an indispensable party. (*Marker v. Marker*, 9 Hare, 1, 5, 12, 16.) This case determines the principle, for the decree must necessarily have affected the rights of the purchaser of the timber.

Had Glauber's name been omitted there could have been no question as to jurisdiction, and he has not been brought within the jurisdiction of the Court by service or appearance. My impression is that the jurisdiction is not ousted by merely naming him in the bill when it appears that he cannot be served. Glauber himself is not present to make, and he does not make, the objection to the jurisdiction, and the other parties who do raise the objection are in no way affected by his absence, or by his being named in the bill. But, however that may be, since he might have been omitted in the first instance to prevent an ouster of the jurisdiction as to the other parties, I see no reason why the bill may not now be amended, before he is brought in, by omitting his name for the same purpose, without prejudice to the motion for an injunction; and the complainant asks leave to amend. I can perceive no good reason why leave should not be granted.

As to the merits. The leading and material facts alleged, showing the right to the water in question, as between the parties to the action, are not denied by the affidavits of the defendants. The water, as is shown by the bill, was discovered and actually appropriated by the plaintiff, and was enjoyed by it for many years, it having been sold to and paid for by the defendant, the Gold Hill Water Company, for several years prior to September 1870. The plaintiff, upon

1871]

Opinion of the Court—Sawyer, J.

the facts alleged, was also necessarily in actual possession of the land out of which the water issued for the purpose of its tunnel, and of taking and enjoying the water, and so far as was necessary to the accomplishment of these objects. Upon the facts as they appear in the bill and affidavits of the moving party, the complainant was the first actual appropriator of the water, and it acquired the right as against the defendants, if capable of so acquiring it.

It is urged that plaintiff was incorporated for mining purposes only, and that it, consequently, has no capacity to acquire a right to the water. But water is required for mining purposes, and in the before-mentioned lease to the defendant, the Virginia and Gold Hill Water Company, the complainant reserved a portion of said water, sufficient for its mining purposes, and only sold the remainder.

So far as required for mining purposes, a capacity to acquire the right to water necessarily exists as incident to the business of mining. But suppose, in pursuing a mining enterprise, other valuable things are found in the path of the work, cannot the corporation appropriate and use them to defray its many expenses, or enhance its profits? Must they be passed by and allowed to go to waste for want of a capacity to make them available, when the corporation can, in fact, render them available and useful in contributing to the success of the main enterprise?

May it not avail itself of all the incidental results of labor necessarily expended in pursuit of the real object for which the corporation was created, because some of these results were not made a specific object to be attained?

If a company is incorporated to mine for silver only, must it discard any gold that it may find in its mine, or in excavating to reach its mine? or if it should chance to fall upon a nest of diamonds in the bowels of the earth while running a drift for its silver ores, must it pass by the glittering treasures with averted eyes, because it has no legal capacity to pick them up and appropriate them to the expenses of the work, or an enhancement of the profits of the enterprise.

Running a tunnel to enable the plaintiff to reach its ledge is, certainly, a legitimate part of the business of mining.

Why may it not appropriate everything valuable, not belonging to anybody else, that turns up in the line of the excavation, to pay the expenses of the work, or enhance the profits of the investment? Is it not one of the incidents to the work which the party developing it may render available?

In the affidavits filed, the defendants disclaim the idea that they are running the Nevada Tunnel for the purpose of obtaining the water in question, but insist that they are running for the purpose of developing mines belonging to other parties. To that extent, then, the Virginia and Gold Hill Water Company, at least, is itself doing that which it has no legal capacity to do.

But it is enough to say, that the defendants, whether corporations, or natural persons, are not in a position to defend a trespass, on the ground that the plaintiff has no legal capacity to acquire the right in question. That the plaintiff may, legitimately, acquire a right to sufficient water for its mining purposes, is clear. Having the capacity to a limited extent, at least, to acquire a water right, whether they have assumed to acquire a larger right than their wants justify, or whether they use the water discovered and appropriated in the progress of their work for other purposes than mining, is no concern of defendants. A party who has trespassed upon the actual possession of the complainant cannot defend on that ground. It is a question between the corporation and the government. By express provision of statute, corporations are usually limited in their purchases of real estate, for instance, to such as are actually necessary to the exigencies of their business. But suppose a much larger amount should be conveyed to a corporation than it was authorized to take, it would not be contended, I apprehend, that a trespasser who had taken possession of a portion of such excess of land, could successfully set up a want of capacity in the corporation to take as a defense to an action of ejectment by the corporation. As between the party despoiled and the wrong-doer, the Courts will not enter upon this inquiry. (*Far. & M. Bk. of Mil. v. D. & M. R. R. Co.*, 17 Wis. 372; *Austin Glass Co. v. Dewey*, 16 Mass. 94; *Whit. M. Co. v. Baker*, 3 Nev. 386; *Natoma Water & M. Co. v. Clarkin*, 14 Cal. 552.)

1871.]

Opinion of the Court—Sawyer, J.

The defendants do not admit that they have been running their tunnel for the express purpose of cutting off the water in question, as alleged in the bill. They would hardly have the boldness to set up a right to take the water from plaintiff, if it is, in fact, the first appropriator.

They allege their object to be, to reach and develop certain mining claims. I am by no means satisfied that it is not the sole object of all the defendants to the action to secure this water.

The Virginia & Gold Hill Water Company was organized for the purpose of supplying Virginia City and Gold Hill with water, and any other purpose, as an end to be attained, than the procuring of water, would be wholly foreign to the objects of its incorporation. And the other defendants do not satisfactorily appear to have any interest in the mining claims set out in the affidavits.

The contracts set out in the defendants' affidavits, beginning with the principal one of April 29, 1867, have all been entered into long since the complainant discovered and appropriated said water, and leased it to the first defendant named in the bill, and that contract expressly refers to water as the principal object sought. The subsequent contracts are stated to have been made in pursuance of the provisions of that contract and to carry it out. Water, then, from the date of those contracts, at least, must have been the object of the defendants and their grantors, and the supply of water in question was known to exist, for it had already been discovered and appropriated, and it does not appear that there is any other known supply on the line of the defendants' tunnel.

The tunnel, since that time, has been excavated in a nearly direct line towards a point some thirty feet in altitude immediately underneath the point where complainants appropriated the water, until said point was reached, and the water thereby taken.

There can be no doubt, upon the facts as they now appear, that, but for the acts of the defendants in running their tunnel below that of complainant, the water which now flows through defendants' tunnel, would still flow through

the tunnel of complainant, as it was wont to do in times past. The water ceased to flow in complainant's tunnel within a few hours after it was struck in defendants' tunnel. Indeed, this is not denied. If, then, the defendants excavated their tunnel expressly to cut off this water, before discovered and appropriated, and divert it from the complainant, their act is wrongful.

If, on the other hand, this was not their object, but the object was to prospect and develop claims owned by them, lying to the westward of complainant's ledge, and the water was necessarily diverted by running their tunnel at the place indicated, it was still wrongful, unless they had a right to so run it, regardless of the appropriation by complainant. Had they such a right?

Sic utero tuo ut alienum non laedas, is one of the time-honored maxims of the law, and I do not perceive why it should not apply in this case.

I know of no principle of law that permits one man to destroy the property of another, or invade the rights of another, in order to enable him the more conveniently to obtain access to, and use, his own.

It may be, that, in a mining country situated as this is, a Court would not restrain a party from merely running a tunnel through his neighbor's ledge, far below the surface, in order to reach his own, when it could be done without material damage, and there is no appropriation of his neighbor's property involved in the proceeding. To do so, might be to throw unreasonable obstacles in the way of carrying on great and highly important enterprises. But, however that may be, I know of no principle that would justify the owner of one ledge, or mine, in absolutely destroying the mine or property of another, not held subject, or in subordination to, the right of the party working the destruction, in order to conveniently reach his own. This would be a palpable violation of the maxim cited.

Water is a highly important element in conducting mining enterprises in California and Nevada, and it is very generally known that it is scarce in Virginia, and the supply of this indispensable necessity for domestic and other

1871.]

Opinion of the Court—Sawyer, J.

uses to the people of Virginia City is almost all, if not wholly, derived from mining tunnels. A stream of water, therefore, thus found in a tunnel excavated for mining purposes, is often as valuable to the possessor as the mine itself; and, to take any such supply of water from one who has acquired a right to it, by means of a tunnel excavated by another party not having a superior right, for the purpose of prospecting or working his own mine, is as clearly a violation of the maxim as the destruction of a neighbor's mine in the same mode.

The authorities cited to the point, that, where one has a spring on his own land, supplied by percolating water, coming from his neighbor's premises, such neighbor may, by digging in his own land, cut off the supply, admitting them to be correct, do not appear to me to reach this case.

The defendants do not appear, by the affidavits, to have made the diversion by digging in their own lands. The water is not shown to have come from their own ledges, or from their immediate vicinity, or from any land to which they have a prior right. It does not satisfactorily appear that any one of the ledges mentioned in the papers lying west of or beyond complainant's ledge, that could be reached or prospected by defendants' tunnel, is a prior location to that of complainants, or that defendants have a prior right to anything in the line of their tunnel to the west, of complainant's ledge. The diversion is accomplished, taking the view most favorable to the defendants, by running a tunnel through other lands in search of ledges claimed by themselves, and ledges too, the location of which, if they have any real existence, seem as yet, and, according to defendants' own affidavits, after a ten years' search, to be entirely unknown. In doing this, they ran directly beneath the place where the complainant appropriated the water on the same land, and cut it off from below. A very different condition of things from that which existed in the cases cited.

I presume it would not be maintained, that defendants in searching for their own mine, could run their tunnel for that purpose directly under complainant's tunnel for its entire length, and so near it, that complainant's tunnel

would fall in, and be destroyed, or thus destroy any essential part of it, not passing through defendants' own ledge, or ground to which they have a prior right. This would be an injury of a strictly analogous kind.

The facts are not fully developed, and without a full discussion of the point, at this time, it is sufficient to say, that in my judgment, as the case is now presented by the bill and affidavits, the matters shown by defendants are not sufficient to overthrow the case made by the complainant. I think it very apparent, upon the case as now presented, as between the parties, that the complainant has the prior right to the water, and that it has been wrongfully cut off and diverted, by means of defendants' tunnel.

It is shown, and this does not seem to be seriously controverted, that the water can be restored by building a water-tight wall or bulkhead across the tunnel at a point indicated. But it is urged, that the injury has been committed, and that, this being so, the Court will not, on motion for a preliminary injunction, issue a mandatory writ, affirmatively commanding the performance of an act such as to fill up a tunnel, rebuild a wall that has been demolished, and the like; and so the authorities seem to be.

But, while this seems to be an established rule, it, also, appears to be well established, that the result sought may be accomplished by an order merely restrictive in form. For example, if the water of a stream be raised by means of a dam, so as to wrongfully flood a party's land above, or obstruct with back-water, a mill situated higher up the stream, while the Court will not direct the defendant in terms to remove the dam, it will require him to refrain from overflowing the land, or obstructing the mill, even though it be necessary to demolish the dam in order to obey the injunction. So if a party, by means of a dam, or canal, should wrongfully divert the water of a stream from the mill of his neighbor, clearly entitled to it, the Court would restrain the continuance of the diversion, even though an obedience to the injunction should render it necessary to remove the dam, or fill up the canal. (2 Eden on Injunctions, by Waterman, 388; 3 Dan. Ch. Pr. 1767, and notes,

1871.]

Opinion of the Court—Sawyer, J.

last edition; *Robinson v. Lord Byron*, 1 Bro. Ch. R. 588; *Lane v. Newdigate*, 10 Ves. Jr. 192; *Rankin v. Huskisson*, 4 Sim. 6 Eng. Ch. 13; *Earl of Moxborough v. Brown*, 7 Bev., 29 Eng. Ch. 127; *Murdock's Case*, 2 Bland, 470-1; *Washington University v. Greene*, 1 Maryland Ch. 502-4; *N. E. J. R. Co. v. C. R. Co.*, 1 Coll. 28 Eng. Ch. 521; *Spencer & Son v. Bir. R. Co.*, 8 Sim. 8 Eng. Ch. 193.)

Under these authorities, by whatever name Judges may see fit to call the injunction, the defendants may be restrained from continuing to cut off and divert the water in question, even though it should be necessary for them to fill up, or build a water-tight barrier across the tunnel to accomplish the end sought.

Upon the facts as now presented, I think the water is wrongfully diverted from complainant's tunnel by means of the tunnel of defendants, and that complainant is entitled to a temporary injunction restraining defendants from continuing the diversion, till the rights of the parties can be more fully ascertained.

For the present, I will fix the amount of the injunction bond at \$15,000, with leave to defendants to move to increase the amount, at any time, if this amount be deemed too small.

Let an order be entered granting leave to complainant to amend its bill by striking out the name of Glauber as a defendant, without prejudice to the motion for an injunction, and upon such amendment being made, and on filing a bond to be approved by the Clerk, or District Judge, in the sum of \$15,000, that a writ of injunction be issued by the Clerk in the form indicated, restraining the defendants, their attorneys, agents and servants from further, by means of their tunnel or otherwise, taking or diverting the water, or any portion thereof, which heretofore flowed from complainant's ledge, and from the spring or point mentioned in the bill of complaint, about forty-eight feet west of said ledge, through and out of complainant's tunnel, or which would flow into and through said complainant's tunnel, from said sources, but for the defendants' tunnel; and from receiving said water, or any part thereof, into and through said defendants' tunnel, and thereby depriving the said complainant thereof, until the further order of the Court.

FREDERICK NORMAN *v.* PIERRE MANCIETTE.

CIRCUIT COURT, DISTRICT OF OREGON,
FEBRUARY 22, 1871.

1. **ARREST OF DEBTOR.—TIME WITHIN WHICH TO CHARGE BODY IN EXECUTION.—**A creditor who has caused the provisional arrest of an absconding debtor under section 106 of the Code (Or. Code, 164) has until the time allowed for a return of an execution against property to charge the body of such debtor in execution.
2. **ABSCONDING DEBTOR, WHO IS.—**An absconding debtor is one who is about to leave the State, either openly or secretly, with intent to hinder, delay or defraud his creditors of their just debts.
3. **IDEM.—**A debtor who is about to remove from this State without the consent of his creditors and without a mind to return, is presumed to be acting with such intent, and *prima facie* he is an absconding debtor.
4. **CONSTITUTIONALITY OF LAW TO ARREST AND IMPRISON.—**The Legislature has power to authorize the arrest and imprisonment of such a debtor so as to enable his creditors to enforce the establishment and collection of their debts by legal proceedings in the tribunals of this State.
5. **ACTION FOR FALSE IMPRISONMENT.—**There can be no recovery in an action for false imprisonment when it appears that the affidavit on which the defendant procured the arrest of the plaintiff is sufficient on its face, because then there is no trespass; and if the affidavit be false, the action must be for malicious prosecution, in which both malice and want of probable cause must be alleged and proved.
6. **PROBABLE CAUSE.—DAMAGES.—**In an action for false imprisonment, the question of probable cause is only material in mitigation of damages.

Before DEADY, District Judge.

O. P. Mason, for plaintiff.

J. W. Whalley and *M. W. Fechheimer*, for defendant.

DEADY, J. On May 10, 1870, the plaintiff commenced an action in the Circuit Court of Multnomah County, against the defendant and A. Labbe and John C. Work, for false imprisonment, wherein he laid his damages at \$5,000.

On July 25, the State Court, on the petition of the defendant Manciette, made an order removing the cause as to him to this Court, on the ground that the plaintiff was a citizen of Oregon and of the United States, and the defendant was an alien and a subject of the Empire of France.

1871.]

Opinion of the Court—Deady, J.

On September 5, the defendant answered the complaint in this Court, whereby he admitted that he caused the arrest of the plaintiff as follows: That on April 6, 1870, the plaintiff being indebted to defendant, and an action being then pending before Justice Work, in Central Portland Precinct, to recover said debt, the defendant made and filed in said Justice's Court the following affidavit, in pursuance of which said Justice then and there issued a writ of arrest against plaintiff, upon which he was then arrested and taken before said Justice, and in default of bail was by said Justice committed to the jail of the county, where he remained until he was discharged by order of defendant, on April 13. The answer also averred, that said affidavit was true, and that the Justice had jurisdiction to issue the writ, and that the proceedings thereunder were regular and lawful. The affidavit is in these words:

“*P. Manciette v. Fred. Norman*: I, P. Manciette, being first duly sworn, say, that I am the plaintiff above named; that the defendant is indebted to me in the sum of \$46, upon an account stated on or about April 5, 1870, at which time defendant promised to pay said sum of \$46; although requested, he has failed to pay said sum or any part thereof and the same is now justly due and owing plaintiff from defendant, and that defendant is about to leave the State of Oregon, with intent to delay, hinder and defraud his creditors. Wherefore the plaintiff prays that a writ may issue for his arrest as in such cases provided.

On November 2, plaintiff replied to the answer and denied that the Justice had jurisdiction to issue the writ of arrest, as alleged in the answer, or that the proceedings thereunder were regular and lawful, and alleged that the plaintiff was discharged from said arrest on April 13, by order of the Circuit Court for the county of Multnomah, State of Oregon, upon a writ of *habeas corpus* sued out by said plaintiff, and not by the order of said defendant, as alleged in the answer.

The cause was tried at the September term and a verdict found for defendant. The plaintiff moved for a new trial, upon the ground of error in the instructions of the Judge to

the jury. On January 17, 1871, the motion was argued and submitted. On the argument of the motion, two points were made by counsel for plaintiff:

I. Admitting the legality of the original arrest, plaintiff was detained thereon one day longer than he should have been, and for this he was entitled to a verdict.

II. That the affidavit upon which the writ of arrest issued is insufficient and therefore not a justification of the arrest.

To understand the first point, it is necessary to state that on the trial it appeared that the action against Norman by Manciette was commenced on April 6—the date of the summons therein—and that on April 12—six days thereafter—judgment was given against Norman for want of an answer. By the laws of this State, in action in a Justice's Court, the summons must require the defendant to appear and answer "at a time and place named therein, not less than six nor more than twenty days from the date thereof." (Or. Code, 585.)

After judgment and return of an execution against property unsatisfied, where the defendant has been personally arrested, the plaintiff may have an execution against his body as a matter of course (*Id.* 210). The undertaking of bail upon a provisional arrest is to the effect, that the defendant will render himself amenable to the process of the Court during the pendency of the action and to such as may be issued to enforce the judgment given against him, if any (*Id.* 167). A person confined in jail on an execution in a civil action may be discharged therefrom at the end of ten days, if it appears to the satisfaction of a Judge or two Justices that he has no property liable to an execution (*Id.* 759–60).

The question upon this point is, therefore, whether the plaintiff is entitled to any and what time after judgment wherein to charge the defendant in execution. There is no direct provision on the subject in the Code. Under the R. S. of N. Y. the period of three months was allowed, and it seems that if the *ca. sa.* or execution was sued out after that time, it was sufficient, if the defendant had not in the meantime obtained a *supersedeas* or discharge on account of

1871.]

Opinion of the Court—Deady, J.

the plaintiff's neglect (*Mintum et al. v. Phelps*, 3 John. 446.) It appears that, at common law, the practice was to sue out a *ca. sa.* or execution against the body at any time within a year from the rendition of the judgment, and if the defendant had been arrested provisionally, upon a *capias ad respondendum* he remained in custody of the Sheriff or his bail until he was charged in execution. If the Code does not provide any particular time within which the plaintiff must take out execution against the body of the defendant, he must be allowed a reasonable time within which to do so—and certainly this is more than one day. Again, it appears from the foregoing citation from the Or. Code, that the plaintiff cannot have execution against the body in any case until process against the property of the defendant has been returned unsatisfied in whole or in part. Now an execution in Justice's court is returnable in thirty days from its date (*Id.* 594).

Taking these provisions of the Code together and construing them by the light of the common law, my conclusion is that the plaintiff has, until the return of the execution against the property, to take out execution against the body, and that in the meantime if the defendant has been arrested provisionally he must remain in the custody of the Sheriff, or his bail, or satisfy the judgment. Nor does it appear that the plaintiff can be liable for false imprisonment for neglecting to give directions for defendant's discharge, when for any reason he has become entitled to it. The duty of procuring the discharge under such circumstances devolves on the defendant, himself, and if for any cause he remains in custody after his imprisonment is legally at an end, it is his own fault rather than the plaintiff's. In such a case a simple application to the Court from which the process issued would procure his discharge. (*Russell et al. v. Champion*, 9 Wend. 462.)

But if the position assumed by counsel for plaintiff be conceded that the one day's imprisonment of the plaintiff, after the entry of judgment was unauthorized and the defendant is liable therefor, I am satisfied that a new trial should not be granted for that cause alone. A new trial will not be granted

merely to enable the plaintiff to recover nominal damages, and when no just end would be obtained by it. (*Crary v. Sprague*, 12 Wend. 47; *Hyatt v. Wood*, 3 John. 241; *Fleming v. Gilbert*, Id. 532; *Hunt v. Bunell et al.*, 5 John. 138; *Hopkins v. Gunnell*, 28 Barb. 537; *McLanahan v. The Universal I. Co.*, 1 Pet. 138; Hilliard on N. T., p. 51; § 14.)

From the evidence I am satisfied that the plaintiff sustained no appreciable injury by reason of this day's imprisonment. At the time of his arrest he appears to have been engaged by the trip as a cook on first one, and then another of the steamers running from this port to the northward. After his discharge he appears to have remained here until after the June election, and was most probably in the employ of some parties interested in the result of it. He does not appear to have had any credit or business standing to be injured by either the arrest or detention. Upon the evidence at the trial a jury would not be warranted in giving the plaintiff anything beyond his actual damages for this one day's detention in prison. The indebtedness is admitted. It was for board furnished plaintiff at defendant's restaurant. The plaintiff has no right to complain if the defendant concluded from his broken promises and equivocal and suspicious conduct that the former intended to leave the country with the intent to avoid the payment of his debt. The plaintiff even refused at the last moment before the issuance of the writ and his intended departure on the steamer, to leave a watch he had as security for the debt, and when arrested, instead of attempting to apply this article of property in satisfaction of the demand, as he knew he could, he hastened to pawn it with a friend, to enable the latter to help him defeat the defendant in his attempt to recover the sum due him. In short, there is nothing in the case which tends to show that the defendant acted from malice; but on the contrary, the evidence is quite satisfactory that whether the arrest or subsequent imprisonment were justifiable or not, the defendant had probable cause to believe that the plaintiff was about to leave the country with intent to defraud him of his just dues. Upon this point the motion for a new trial must be denied.

1871.]

Opinion of the Court—Deady, J.

A question was made by counsel for defendant that it did not appear that plaintiff was the person discharged on the writ of habeas corpus as alleged in his replication. Whether this be so or not is not material to the defendant. There is no proof that the plaintiff was discharged by his order as alleged in his answer.

In support of the second point counsel for plaintiff contends that Section 106, Sub. 1 of the Code (Or. Code, 164) under which this arrest was made is in conflict with the Constitution of the State and therefore void. The section in question provides that the defendant may be arrested:

“In an action for the recovery of money or damages on a cause of action arising out of contract when the defendant is not a resident of the State or is about to remove therefrom:”

The Constitution (Art. I. Sub. 19) declares: “There shall be no imprisonment for debt except in cases of fraud and absconding debtors.” This clause of the Constitution has never been construed by the Supreme Court of the State, and this Court, in this case, must therefore give it such construction as to it appears proper.

It may be proper to remark at the outset, that as between the State Constitution and the Legislature of the State, the power of the latter is unlimited, except when expressly restrained by the former. Sub. 19 of Art. I of the Constitution is a limitation or restraint upon the power of the Legislature, over a rightful subject of legislation, and therefore not to be construed so as to include cases beyond its plain and obvious meaning and purpose.

In *United States v. Walsh* (1 Abb. U. S. Rep. 71) I held that this clause of the Constitution should be construed as if it read: “There shall be no imprisonment for debt arising upon contract express or implied, except,” etc. In support of this conclusion it was then said: “The word debt is of very general use and has many shades of meaning. Looking to the origin and progress of the change in public opinion, which finally led to the abolition of imprisonment for debt, it is reasonable to presume that this provision in the State Constitution was intended to prevent the useless

and often cruel imprisonment of persons who, having honestly become indebted to others, are unable to pay as they undertook and promised. * * General or abstract declarations in bills of rights are necessarily brief and comprehensive in their terms. When applied to the details of the varied affairs of life they must be construed with reference to the causes which produced them and the end sought to be obtained. A person who wilfully injures another in person, property or character, is liable therefor in damages. In some sense he may be called the debtor of the party injured, and the sum due for the injury a debt; but he is in fact a wrong-doer, a trespasser, and does not come within the reason of the rule which exempts an honest man from imprisonment, because he is pecuniarily unable to pay what he has promised. For instance, a person who wrongfully beats his neighbor, kills his ox, or girdles his fruit trees, ought not to be considered in the same category as an unfortunate debtor."

With this general view of the intent and purpose of the Constitution, I proceed to consider the alleged conflict between it and the statute under which the plaintiff was arrested.

For the plaintiff it is contended that absconding debtors and debtors about to remove from the State are not in the same category—not the same class of persons—that the latter description includes persons not within the purview of the first, and hence the conflict. Is the argument, or rather the assumption upon which it is founded, correct?

And first, to remove, as used in the Code, must be construed not to apply to a debtor who is about to depart from the State with a definite intention of returning within some reasonable time. Such a debtor may be said to be about to *absent* himself from the State, but not to *remove* from it. But a debtor who is about to leave the State without any definite purpose to return, is one who is about to remove from the State—to exchange this place for another.

Is such a debtor an absconding debtor? I think he is. True, he may not leave the State clandestinely or secretly, but he withdraws himself from it without fulfilling his ob-

1871.]

Opinion of the Court—Dedy, J.

ligations to his creditors resident in it—leaving his debts behind him unsatisfied. By such removal, whether public or secret, his creditors are deprived of the opportunity of realizing their demands by due process of law out of his present property or further accumulations, unless they should go to the trouble, expense and uncertainty of pursuing him into another jurisdiction. The power of the Legislature to authorize and provide for arrest and imprisonment for debt is unlimited “in the case of absconding debtors.” The phrase “absconding debtors,” grammatically speaking, includes debtors who have actually absconded, as well as those who intend to do so. But after a debtor has left the State he is beyond the reach of its process, and for this reason, if no other, the power to imprison on this account is practically limited to the case of debtors still within the State. Yet it is not to be restrained to such debtors only as may be taken in the act of stepping across the State line, or on to a stage coach, steamboat or railway carriage, that will carry them beyond the process of the law in a few hours or minutes. There is no good reason why the law should be more tender concerning a debtor who is preparing to abscond—getting ready to remove without paying his debts—than one who is in the act of absconding. In either case the end to be obtained is the same. The right to imprison is a remedy given the creditor to enable him to prevent his debtor from permanently removing beyond the jurisdiction without his consent. But if the creditor’s right to this remedy does not arise until the debtor is actually in the act of absconding, then in most cases it would prove to be too late to be of any service to him. In my judgment, from the moment of taking the first step toward the contemplated removal, without any definite intention of returning, the debtor becomes an absconding one; and the Legislature has ample power to prevent the accomplishment of this purpose, by authorizing and providing for his arrest and imprisonment in such manner and upon such terms and conditions as it may think best. *Prima facie*, a debtor who removes from the State without the consent of his creditors, does so with the intent to hinder, delay or

defraud them of their just debts. True, a clandestine going is a particular circumstance from which, in an otherwise doubtful case, it may be reasonably inferred that the debtor is removing without an intent to return, and with the intent to hinder, delay or defraud his creditors. But if a removal by a debtor from the State can never amount to an absconding unless done or attempted in a clandestine or secret manner, then if a fraudulent debtor will only have the shrewdness and effrontery to remove openly, he may leave his creditors in the lurch with impunity.

This provisional arrest is only allowed to secure the appearance and answer of the debtor in the action for the recovery of the debt. If judgment is obtained against the debtor, and he has no property or effects liable to execution, he can procure his discharge and exemption from further imprisonment on this account. But, in the meantime, the creditor has had an opportunity of obtaining a personal judgment against the debtor, which is sufficient to establish his claim in any country in Christendom to which the debtor may remove. And this is not all. Before the debtor can be discharged from imprisonment upon an execution to enforce such judgment, he may be compelled to apply money and valuables belonging to him, to its payment, which he would otherwise fraudulently and successfully conceal and secrete beyond the reach of an ordinary execution against property. But if a debtor is permitted to remove from the State with impunity without first satisfying his creditor, the latter is thereby deprived of these and other means given by the law of the State to enforce the collection of his debt from a reluctant or dishonest debtor. This being so, he is hindered and delayed in his debt if not ultimately defrauded out of it by such removal. His debtor has absconded—removed from the State without performing his promise to one of its citizens according to its legal obligation.

To prevent this injury to the creditor, the Legislature, in the exercise of its unlimited power to authorize imprisonment “in case of absconding debtors,” has given him the right to cause the provisional arrest of his debtor about to remove from the State, and I do not find any reason for con-

1871.]

Opinion of the Court—Deady, J.

cluding that there is any repugnance or conflict between its act and the Constitution, but the contrary.

Upon the construction of the Constitution there can be no doubt but that the affidavit of the defendant was sufficient to justify the issuing the writ of arrest. Indeed, it would be sufficient, it seems to me, even under the narrow and limited construction which counsel for plaintiff maintained should be given to the phrase—"in the case of absconding debtors." It alleges that Norman being indebted to Manciette upon account stated "is about to leave the State of Oregon with intent to delay, hinder and defraud his creditors." The affidavit for arrest need not pursue the language of the code. It is sufficient if it contains terms which are substantially equivalent to those of the statute. To leave the State is equivalent to remove from it. Primarily, both of these terms import a withdrawing therefrom without a mind to return. But this affidavit goes farther and alleges that such leaving or removal is about to take place with intent to "hinder, delay and defraud creditors." That this expression is equivalent to an allegation that a debtor is about to abscond from the State, in any or the worst sense that can be given to that term, is to my mind very plain. Whether the debtor would have left or absconded secretly or openly if the creditor had not interposed and caused his arrest, could not be known to the creditor beforehand, when he made this affidavit. Nor was it a material question in what manner he was about to leave or abscond, but rather for what purpose or with what intention. The manner of attempting the removal or accomplishing it is only material as tending to show the object of it. *Prima facie*, a removal from the State by a debtor, without a mind to return, is an absconding—a permanent withdrawing from the State, while his pecuniary obligations to his creditors are unperformed, to their prejudice, hindrance and delay.

The affidavit upon which the defendant caused the arrest of the plaintiff being regular and sufficient upon its face, this action for false imprisonment will not lie. In such case there is no trespass; but if the arrest was wrongful or false in fact—procured upon a false allegation, the remedy

Statement of the Case.

[March,

of the party is an action for malicious prosecution, in which he must allege and prove both malice and want of probable cause. In this action the question of probable cause could only have been material in mitigation of damages in case the arrest had been held to be a trespass because of the insufficiency of the affidavit. (*Sleight v. Ogle*, 4 E. D. Smith, 445.) In this case if the action were for malicious prosecution, I should feel warranted in declaring upon the evidence adduced at the trial that there was neither malice or want of probable cause.

Motion for new trial denied.

YELLOW JACKET SILVER MINING COMPANY v. STEPHEN
T. GAGE, UNITED STATES COLLECTOR OF INTERNAL
REVENUE FOR THE DISTRICT OF NEVADA.

CIRCUIT COURT, DISTRICT OF NEVADA,
MARCH 1, 1871.

1. WHO LIABLE AS ASSAYER.—A mining company not assaying for others, but assaying its own ores, on its own account only, and not assaying any bullion or amalgam, is required to pay a special tax as assayer, under subdivision forty-eight of section seventy-nine of the Internal Revenue Act of June 30, 1864, as amended in 1866.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

THE defendant, as Collector of Internal Revenue for the District of Nevada, collected of plaintiff a special tax levied upon it as an assayer. The tax was paid under protest, and this action brought to recover the tax so collected. Plaintiff claimed, that it was not an assayer, under the act of Congress, and not liable to the tax. The facts are sufficiently indicated in the opinion.

T. H. Williams, for plaintiff.

Jonas Seely, U. S. District Attorney, for defendant.

1871.]

Opinion of the Court—Sawyer, J.

SAWYER, Circuit Judge. The question to be determined in this case is, whether a mining corporation assaying its own ores, simply, and assaying for itself and not for others, and not assaying any bullion or amalgam, is required to pay a special tax as assayer under subdivision forty-eight of section seventy-nine of the act of June 30, 1864, as amended in 1866.

The provision of the statute is as follows :

“Assayers, assaying gold and silver, or either, of a value not exceeding in one year two hundred and fifty thousand dollars, shall pay one hundred dollars, and two hundred dollars when the value exceeds two hundred and fifty thousand dollars and does not exceed five hundred thousand dollars, and five hundred dollars when the value exceeds five hundred thousand dollars. Any person or persons or corporation, whose business or occupation it is to separate gold and silver from other metals or mineral substances with which such gold or silver, or both, are alloyed, combined or united, or to ascertain or determine the quantity of gold or silver in any alloy or combination with other metals, shall be deemed an assayer.” (14 St. at Large, 121.)

It will be observed, that the statute, in the latter clause of this provision, defines the term assayer, as used in the act, and it is necessary to ascertain what is intended to be embraced by this definition. The statute says nothing about separating gold and silver from other metals for fee or reward, or for parties other than the party engaged in assaying. There is, then, no such express limitation to assaying for others, or for fee or reward; and if it was intended to so limit the term, the limitation must be derived, as a necessary inference, from some other provision of the statute, or from the whole statute, reading the different parts in connection with each other. After a careful examination of the numerous sections of the act, we find nothing to afford a reasonable inference that such limitation was intended. It seems evident that Congress designed to tax most of the ordinary occupations of the people, whether pursued by the respective parties on their own account, or for others for

fee, or reward. When the occupation taxed is intended to be limited to acts performed for others, or for a fee, or reward, Congress has so expressed it in language not to be misunderstood. In some cases both are mentioned; thus, in the eighth subdivision, the definition of a livery stable keeper includes both those who “keep horses for hire,” and who “keep, feed, or board horses for others.” The ninth includes in the definition of brokers, those who negotiate sales and purchases for “themselves or others.” Those who do business on their own account are clearly taxed in many cases. See subdivision 12 *et seq.* 16, 17; *et seq.* 30, 31, 33. Under subdivision 30, auctioneers are taxed, and declared to be persons “whose business it is to offer property at public sale to the highest and best bidder.” There can be no doubt that this would include those whose business is to regularly sell, in the mode indicated, their own, as well as others’, property. Subdivision forty-three expressly limits the definition of lawyers to those “who for fee, or reward, shall prosecute,” etc. So subdivisions forty-four and fifty, and others, contain similar limitations; and section eighty-one is adopted, apparently, for the express purpose of limiting the meaning of the definition given in other sections, so that parties embraced in the general language of such sections shall not be held liable to a tax for certain specified matters pertaining to their own business. Thus, it is manifest, that, when the tax is intended to be imposed only on those who perform the act indicated for others, for hire, fee, or reward, Congress has had no difficulty in finding apt words to express that intention.

And section seventy-six provides, “that in every case where more than one of the pursuits, employments or occupations hereinafter described shall be carried on in the same place by the same person at the same time, except as hereinafter provided, the tax shall be paid for *each* according to the rate prescribed, etc. So the fact that the plaintiff is subject to pay a miner’s tax under subdivision forty-nine, does not militate against the idea that it can, also, be subject to a tax, as assayer, under subdivision forty-eight. Indeed, it seems to contemplate this very case, of a party engaged in both occupations as a part of his business.

1871.]

Opinion of the Court—Deady, J.

These two provisions relating to assayers and miners are closely connected in the same section, and in consecutive subdivisions, so that Congress, necessarily, had its attention called to both occupations at the same time, and, if it had intended to exclude from the tax, assaying for himself, when performed by the miner, as a branch of his business of mining, Congress could scarcely have failed to express that intent in terms, when the two branches of the business were, necessarily, brought to its notice in such intimate relations.

When the plaintiff as a part of its business is engaged in “assaying its own ore,” it is separating the “gold and silver from other metals or mineral substances with which such gold or silver is alloyed, combined or united,” etc., and this is within the express terms of the statutory definition of an assayer.

We think the plaintiff is an assayer, within the meaning of the statute, and subject to the tax imposed therein, and that the defendant must have judgment; and it is so ordered.

CHRISTIAN HANSON v. FRANK FOWLE AND A. F.
.TURNER.

DISTRICT COURT, DISTRICT OF OREGON,
MARCH 1, 1871.

1. IMPRISONMENT FOR DEBT IN ADMIRALTY SUITS.—The act of March 2, 1867 (14 Stat. 543), adopting the State law concerning “modifications, conditions and restrictions upon imprisonment for debt” does not apply to process in Admiralty suits.
2. IDEM.—The act of August 23, 1842 (5 Stat. 517), gave the Supreme Court full authority to regulate the process and forms of proceedings in suits of Admiralty, and it will not be presumed that Congress intended to change the rule prescribed by that Court upon the subject of imprisonment on process in Admiralty and adopt the State law, unless it is explicitly so provided.
3. CLAIM FOR DAMAGES FOR INJURY TO PERSON NOT A CLAIM FOR A DEBT.—An action to recover damages for an injury to the person with force, is not

Opinion of the Court — Deady, J.

[March,

an action to recover a debt, and the claim for such damages is not a claim for a debt, within the meaning of that term as used in the act of 1867 (Ad. Rule 48, or Sub. 19 of Art. 1 of the State Constitution)—at least until it is changed or merged in a judgment for a sum certain.

4. AT COMMON LAW.—At common law, a *capias* lay, both before and after judgment in actions for injuries committed with force, but not otherwise, until the statute of Marlbridge (52 Hen, III. C. 23, and Westminster 2, 13 Edw. I. C. 11, etc.)

Before DEADY, District Judge.

This suit was commenced January 30, 1871. The libel charges that in August, 1870, while on a voyage from Newport, Wales, to this port, in the American brig *Madawasca*, the defendant Turner being then second mate on said brig, in the presence and with the consent of the defendant Fowle, who was then master of the same, did, without cause, beat the libellant, a seaman on said brig, with a capstan bar and otherwise, and thereby fractured his left arm, and otherwise injured said libellant, to his damage, \$2,000.

Upon reading and filing the libel, an order was made at Chambers, allowing a warrant of arrest to issue against the defendants, in pursuance of the S. C. Admiralty Rules 2, 7 and 48. Upon this process the defendants were arrested. Fowle gave bail, but Turner was committed to jail for want thereof.

Separate motions or exceptions were afterward made or taken by each defendant to vacate the order allowing the warrant, or to set aside the proceeding and process as irregular.

On February 11, these motions were argued and submitted together.

Theodore Burmister, for libellant.

J. W. Whalley, for defendant Turner.

Orland Humason, for defendant Fowle.

DEADY, J. Section 106 of the Code prohibits arrest in an action at law, except in certain cases therein specified. Subdivision 1 of said section authorizes an arrest of a de-

1871.]

Opinion of the Court—Deady, J.

fendant in an action for damages “for any injury to the person.” Section 107 of the Code prescribes the mode or conditions of obtaining a writ of arrest in the cases specified in section 106 (Or. Code, 164–5). Substantially these conditions are, that the facts authorizing the arrest shall appear by affidavit, and that the party asking the writ shall file an undertaking, with sureties, to the effect that they will pay defendant all damages which he may sustain by reason of the arrest.

Rules 2 and 7 of the S. C. Admiralty Rules, adopted at the term of December, 1844, authorizes an arrest in all suits *in personam*; but rule 48, adopted at the term of December, 1850, “abolishes imprisonment for debt” on admiralty process in all cases where it is abolished upon similar or analogous process by the laws of the State where the Court is held. It seems that this rule is not deemed to adopt the conditions and restrictions imposed upon the right to arrest a defendant by the State law. It simply adopts the law of the State prescribing the instances or cases in which an arrest is allowed, leaving the national Courts to pursue their own mode of proceeding in the premises. (2 Conkling’s Ad. 135–6.)

Upon this understanding of the law and the rules applicable to the subject, the order allowing the warrant of arrest in this suit was made, and the warrant issued without the libellant first filing the undertaking to the defendants.

It is now contended by counsel for the motion, that the act of March 2, 1867 (14 Stat. 534), entitled, “An act supplementary to the several acts of Congress abolishing imprisonment for debt,” applies to process in admiralty proceeding, and that therefore this warrant was improperly issued, because the libellant had not first performed the conditions imposed by section 107 of the Code upon plaintiff’s right to have a defendant arrested in a similar case. If the premises are correct, the conclusion follows.

The act of 1867 provides: “That whenever, upon mesne process or execution issuing out of any of the Courts of the United States, any defendant therein is arrested or imprisoned, he shall be entitled to discharge from such arrest or imprisonment in the same manner as if he was so arrested

or imprisoned on like process of the State Courts in the same district. And the same oath may be taken, and the same length of notice thereof shall be required, as is provided by such State laws; and all modifications, conditions and restrictions upon imprisonment for debt, now existing by the laws of any State, shall be applicable to the process issuing out of the Courts of the United States, therein, and the same course of proceeding shall be adopted as now are or may be in the Courts of such State. But all such proceedings shall be had before some one of the Commissioners appointed by the United States Circuit Court to take bail and affidavits."

The acts to which this purports to be supplementary are those of February 28, 1839, and January 4, 1841 (5 Stat. 321, 410); and taken together, they, in effect, abolish imprisonment for debt on process issuing out of any Court of the United States, in all cases whatever where, by the laws of the State in which the said court shall be held, imprisonment for debt has been or *shall hereafter be abolished*; and also provided, that where, at the date of the first named act, imprisonment for debt was allowed upon conditions and restrictions, it should be allowed in like manner in the United States Courts.

The provision in regard to conditions and restrictions upon the allowance of an arrest not being prospective, do not adopt the laws of any State on that branch of the subject, passed since February 28, 1839. It was also held, that these acts did not apply to debtors of the United States (*United States v. Hewes*, Crabbe, 307); nor to process *in personam* issuing out of the Admiralty Courts (*Gardner v. Isaacson*, 1 Abb. Ad. R. 141; *Gaines v. Travis*, Id. 422).

Taken literally and construed without reference to any consideration beyond that appearing upon the face of the statute, there is no reason to suppose that Congress did not intend the acts of 1839 and 1841 to apply to process in suits in admiralty, and with equal reason, the same may be said of the act of 1867. Yet Mr. Justice Betts, in 1848 and 1849, in the cases above cited (1 Abb. Ad. R. 141, 422) deliberately held the contrary, and I am satisfied to follow his conclusion, until Congress shall otherwise explicitly provide.

1871.]

Opinion of the Court—Dedy, J.

From the foundation of this government, in all legislation concerning the process and proceedings in the National Courts, Congress has never confounded the three different and distinct branches or heads of jurisdiction, known as Common Law, Equity and Admiralty. The process acts of 1789, 1792, 1793 (1 Stat. 93, 275, 335), and 1828 (4 Stat. 278), all uniformly provide that the forms of writs, execution and other process, and the forms and modes of proceeding in suits of Admiralty jurisdiction shall be according to the rules and usages which belong to Courts of Admiralty as contradistinguished from those of common law. These acts, except the first one (which was only temporary), also provide that these forms and modes of proceeding are subject to such alterations and additions as the Courts of Admiralty might deem expedient, “or to such regulations as the Supreme Court of the United States shall think proper from time to time by rule, to prescribe to any Circuit or District Court concerning the same.

By the act of August 23, 1842 (5 Stat. 517), the Supreme Court was empowered to regulate the whole subject of process and proceedings in Courts of Admiralty. This was an extension, probably, of the power already conferred upon that Court by the above cited acts of 1792, 1793 and 1828. In pursuance of this authority the Supreme Court made rules 2, 7 and 48, regulating imprisonment on Admiralty process, under which the arrest in this case was made.

Under this state of statutes, rules and decisions, all of which, it must be presumed, were well known to Congress at that time, I do not think it reasonable to conclude that it was the intention of the act of 1867 to modify the act of 1842—change the rules of the Supreme Court, and so far, withdraw the subject from its authority. If so, it seems to me, that process in Admiralty would have been explicitly mentioned; particularly when it was so well known that similar language in the former statutes on the subject of imprisonment for debt had been construed by the Courts not to include Courts of Admiralty. On the other hand, substantial reasons can be assigned for the passage of the act of 1867, without including that of the regulation of imprisonment upon Admiralty process.

The first half of the act has no application to the question before the Court in any view of the subject. It only regulates—by adopting the law of the State upon the subject—the discharge of persons already imprisoned for any cause, on process issuing out of the National Courts. For instance, by the law of this State a person imprisoned on execution—after judgment—ten days, may be finally discharged from such imprisonment if he makes it appear that he has no property liable to execution. (Or. Code, 759.) The effect of this provision, at least, is to enable a person imprisoned on execution in a common law action in this Court, to obtain a final discharge therefrom, upon the same terms and conditions that he could in a similar action in a State Court; and this was not so held or understood before. (*Catherwood et al. v. Gopete et al.*, 2 Curt. C. C. 94; *In re Freeman*, Id. 493, and cases there cited). The latter clause of the act obviates or provides for a difficulty which had frequently arisen in the administration of the State laws regulating “executions and other final process” adopted by Section 3 of the Process Act of 1828 (see *In re Freeman*, cited above), by providing that the proceedings to obtain a discharge shall be had before a Commissioner of the Circuit Court, rather than the State officer as provided by the State law.

The middle clause which adopts the State law concerning “modifications, conditions and restrictions upon imprisonment for debt,” was called for or suggested, at least as to the “conditions and restrictions,” by the well known fact, that the acts of 1839 and 1841, to which it is supposed this is supplementary, had in this respect been construed to be not prospective. Since the date of the first of these acts, serious changes have been made on the subject in the States then in the Union, while as to the States since admitted, they did not apply at all. If the phrase “modifications upon imprisonment” is construed to be something more than cumulative upon the terms “conditions and restrictions” immediately following, and to have a distinct and independent operation in regard to the subject—“imprisonment for debt”—then it was probably inserted in the act to meet and obviate the construction given to the acts of 1839

1871.]

Opinion of the Court—Deady, J.

and 1841, in *Catherwood et al. v. Gopete et al.*, and *In re Freeman, supra*, where it was held that these acts did not adopt a law of the State which, instead of abolishing imprisonment for debt, only modified it and allowed it in certain cases.

In addition to these considerations in support of the conclusion that the act of 1867 was not intended to apply to process in admiralty, weight should be given to the manifest impropriety of subjecting imprisonment on such a process to all the varient and varying conditions and restrictions which may be imposed from time to time upon imprisonment for debt in common law actions, which mainly arise between citizens of the same State, by the Legislatures of the several States. By the constitution, Admiralty Courts cannot exist in the States. Their laws imposing conditions and restrictions upon imprisonment for debt are not framed with a view to the exigencies of the class of persons who constitute the suitors in such courts, or the nature of the controversies over which they have jurisdiction. If a sailor arriving in a strange port must in all cases give security in the amount claimed, before he could arrest an officer of the ship in a suit for a wanton and serious injury to the person, it would generally operate as a denial of justice to this class of persons. Under such circumstances the defendant, “if sued without arrest, would find a substantial defense in a fair wind and open sea.” (Ben. Ad. 232.)

True, if no restrictions are imposed upon the right to arrest a defendant, serious injury may be done to an innocent party by an irresponsible or transient libellant. But a Court of Admiralty is best calculated to judge, under what circumstances and to what extent to impose restrictions upon the issuance of a warrant of arrest. Probably, as a rule, security should be first given for any damage which the defendant may sustain if the arrest should prove wrongful; but when it appears that the libellant is unable to give such or any security, and prays an arrest of the defendant for some prescribed cause of arrest, the warrant might issue subject to the right of the defendant to give bail, or demand

Opinion of the Court—Deady, J.

[March,

and have an immediate inquiry before a commissioner, to ascertain whether or not there is probable cause of suit and arrest. If upon the examination of the case the commissioner should conclude that there was probable cause, he should endorse that fact upon the warrant, which should thereafter be deemed equivalent to security, or otherwise he should order the defendant discharged.

Again Admiralty jurisdiction is given by the constitution exclusively to the United States, and the Supreme Court is the ultimate judge of the limits of this jurisdiction. Courts of Admiralty or in some sense international and inter-State Courts, and for these reasons as well as others, the regulation of their process and proceedings seems so appropriately to belong to the Supreme Court, and is so foreign to the genius and spirit to the local laws of the States, that it is not to be inferred without very good reason, if not explicit declaration, that Congress after confiding this authority to that tribunal by the act of 1842, intended to take it away by the act of 1867 in the mere matter of "modifications, conditions and restrictions upon imprisonment for debt," and give it to the States, in proceedings which for the most part arises not between citizens of the State, but between non-residents, strangers and aliens. (*The St. Lawrence*, 1 Black. 528.)

Nor is it admitted that this warrant of arrest issued without the facts necessary to authorize an arrest first appearing by affidavit as required by sec. 107 of the Or. Code. The libel being verified and the cause of suit and arrest being identical, the facts authorizing the issuance of the warrant did appear from the written oath of the libellant—his affidavit. In *United States v. Walsh*, *supra*, this Court held that when the cause of arrest was sufficiently set forth in the complaint, a separate affidavit as to these facts is not necessary to authorize an arrest.

Counsel for defendant Turner seeks to distinguish this case from that, because in the re-enactment of Section 107 in 1865, so as to allow the writ to be issued by the clerk without a judge's order, the wording of the section was so changed in this respect, that instead of simply requiring the facts to appear by affidavit when the writ is allowed, with-

1871.]

Opinion of the Court—Deady, J.

out reference to the time of its filing as before, it read that the affidavit for the arrest should be “filed after the commencement of the action,” and therefore after the filing of the complaint, and therefore it must be something different and in addition to the complaint. This is an extremely fine point, and rests wholly upon the letter of the statute, without giving any consideration to the reason or purpose of it. A provisional arrest is not allowed before the commencement of an action nor after judgment therein. These are the limits within which the proceedings, including the filing of the affidavit, for a provisional arrest must be taken; and for all practical purposes an affidavit filed with the complaint—at the same time—and upon which the writ is afterward allowed is within the statute. No importance is given by the section to its being filed any perceptible time after the complaint. The time between the commencement of the action and the judgment is given for the convenience of the plaintiff, and to enable him to procure the arrest at any time before judgment, if cause should arise in the progress of the action. So far, the purpose is to prohibit or prevent the allowance of the writ before the commencement of the action, and nothing more. This being so, a verified complaint may very properly be considered both a complaint and an affidavit, and if the facts contained in it justify an arrest, it is sufficient for that purpose.

Counsel for defendants also argued that an arrest for an injury to the person was not allowed by the law of this State, and therefore this arrest was not even within the authority of Admiralty Rule 48. Of course, counsel admits that Sub. 1 of Section 106 above cited, provides for an arrest of the defendant in an action for damages for an injury to the person, but he contends that this provision of the section is in conflict with Sub. 19 of Art. I. of the Constitution of the State, which declares: “There shall be no imprisonment for debt, except in cases of fraud and absconding creditors.” In *United States v. Walsh, supra*, it was held that this clause of the Constitution should be construed as if it read: “There shall be no imprisonment for debt, arising upon contract express or implied, except,” etc. In support of this conclusion, the Court said:

Opinion of the Court—Deady, J.

[March,

- “General or abstract declarations in bills of rights are necessarily brief and comprehensive in their terms. When applied to the details of the varied affairs of life, they must be construed with reference to the causes which produce them, and the end sought to be obtained. A person who wilfully injures another in person, property or character, is
- liable therefor in damages. In some sense he may be called the debtor of the party injured, and the sum due for the injury, a debt; but he is in fact a wrong-doer, a trespasser, and does not come within the reason of the rule which exempts an honest man from imprisonment, because he is pecuniarily unable to pay what he has promised. For instance, a person who wrongfully beats his neighbor, kills his ox or girdles his fruit trees, ought not to be considered in the same category as an unfortunate debtor.”

And this accords with the course of the common law, which did not give process against the body either before or after judgment only in actions for wrongs accomplished with force; it being a rule that in actions *vi et armis a capias* lay, and when a *capias* lay in process a *capias ad satisfaciendum* lay after judgment. Afterwards a *capias* was given in actions of account by the statute of Marlbridge, 52 Hen. III. C. 23, and Westminster 2, 12 Edw. I., C. 11; in debt and detinue by Statute 25 Edw. III., C. 17; in case by Statute 19 Hen. VII., C. 9; and in annuity and covenant by the Statute of 23 Hen. VIII., C. 14, 3 Black. Com. 281; 1 Attorney's Prac. K. B. 280.

To conclude, the motion must be denied, because:

I. That portion of the act of 1867 which adopts the State law concerning the “modifications, conditions and restrictions upon imprisonment for debt,” does not apply to process in suits in Admiralty.

II. The suit of the libellant is not to recover a debt within the meaning of that term as used in the Admiralty Rule 48 of the act of 1867, or the constitution of the State, at least until it shall ripen into a decree for a sum of money certain, but to recover damages for an injury to the person with force, for which the defendant might be arrested under Admiralty Rules 2 and 7, whether the State law allowed an arrest in such cases or not.

1871.]

Opinion of the Court—Deady, J.

THE UNITED STATES *v.* G. B. HOWARD.SAME *v.* SAME.DISTRICT COURT, DISTRICT OF OREGON,
MARCH 13, 1871.

1. **INDICTMENT FOR VIOLATION OF INTERNAL REVENUE LAWS.**—An indictment which charges a defendant with carrying on the business of a retail liquor dealer without payment of a special tax at a certain place, continuously between certain dates, is sufficient without stating the means or circumstances by which he became such retail dealer.
2. **IDEM.**—All persons who deal in tobacco are not liable to pay a special tax, and therefore an indictment which charges that a person was a dealer in tobacco without paying the special tax, is not sufficient, but the indictment should also show that he was such a dealer as is required to pay such tax.
3. **IDEM.**—A person for the time being in the possession and control of a billiard table, in a place or building open to the public, is *prima facie* the proprietor of a billiard room, and liable to pay the special tax therefor, even if the general property and ultimate control of the table or place, or either of them, be in some one else.
4. **IDEM.**—An allegation, that a party carried on the business of keeping a billiard table in a particular building, although unskillful pleading, is equivalent to an allegation that he kept a billiard room and was the proprietor thereof.

Before DEADY, District Judge.

John C. Cartwright, for plaintiff.*Erasmus D. Shattuck* and *Richard Williams*, for defendant.

DEADY, J. On March 9, 1871, the Grand Jury of this District found two indictments against the defendant. One of them contains one count and the other two, and they will be considered as one indictment with three counts. The first count charges that the defendant, at Corvallis, Oregon, on May 1, 1870, and continuously thenceforth to February 14, 1871, “did exercise and carry on the business of a retail liquor dealer without having paid the special tax” therefor, as required by law.

The second one charges, that the defendant, at the place,

Opinion of the Court—Deady, J.[March,

and continuously between the dates aforesaid, “did exercise and carry on the business of a dealer in tobacco without having paid the special tax” therefor; and the third one charges, that the defendant, at the place, and continuously between the dates aforesaid, did “exercise and carry on the business and occupation of keeping and running a billiard table, open to the public and for the use and accommodation of the public aforesaid, in a building on Second street, without having paid the special tax” therefor.

The defendant demurs to the indictments because

I. Of a misnomer as to his Christian name therein;

II. The facts stated do not constitute an offense; and,

III. The acts constituting the offense are not stated therein.

Misnomer cannot be taken advantage of by demurrer. For aught that appears G. B. Howard is the true name of the defendant. If not, he must so allege by a plea in abatement, and at the same time state what his name is. This is the course of proceeding at common law. Under the Code the matter is simplified and no objection can be taken to an indictment on the ground that the defendant is not truly named therein. (Or. Code, 458.) If he is misnamed he must correct the mistake when called upon to plead. So far as appears the second and third causes of demurrer are substantially the same. The difference between is merely a verbal one.

In support of this cause of demurrer it is maintained by counsel for defendant, that it is not sufficient to allege that the accused was engaged in the business of a tobacco dealer or retail liquor dealer, but that the indictment should also state how or the means whereby he became such dealer. That a special tax is not required of all dealers in tobacco, and that, therefore, it is necessary to allege in the indictment, not only that the defendant was a dealer in tobacco, but that he was such a dealer or a dealer under such circumstances as required the payment by him of a special tax. That it does not appear from the third count that the defendant was proprietor of a billiard-room, or that he even kept a billiard-room, but only a table.

1871.]

Opinion of the Court—Dedy, J.

The provisions of the statutes bearing upon the question are substantially these: Sec. 73 of the act of June 30, 1864 (13 Stat. 248), under which the indictments are found provides that: "Any person who shall exercise, or carry on any trade, business or profession, or do any act hereinafter mentioned, for the exercising, carrying on or doing of which a special tax is provided by law, without payment thereof, as in that behalf required, shall, for every such offense * * * * be subject to a fine or penalty of not less than ten nor more than five hundred dollars. And if such person shall be a manufacturer of tobacco, snuff or cigars, or a wholesale or retail dealer in liquors, he shall be further liable to imprisonment for a term not less than sixty days and not exceeding two years."

By section 44 of the act of July 20, 1868 (15 Stat. 1848), the punishment for retailing liquor without payment of the special tax, was changed to a fine of not less than \$500 and imprisonment not less than six months nor more than two years. By section 59 of the same act (Id. 150) a special tax of \$25 dollars was imposed upon retail dealers in liquors and \$100 upon wholesale dealers. This latter section also defines a retail liquor dealer to be one who sells or offers for sale spirits, wine or malt liquors of any kind, and whose annual sales, including those of all other merchandise, does not exceed \$25,000. By act of March 10, 1869 (16 Stat. 42), this definition was amended so as to make any one "who sells or offers for sale" spirits, etc., "in less quantities than five gallons at the same time," a retail liquor dealer, without regard to the amount of his annual sales.

Ordinarily, an indictment should not only contain a certain description of the crime of which the defendant is thereby accused, but also of those necessary circumstances by which it is constituted, so as to identify the accusation. But to this general rule there are some exceptions. In the case of barrettry, or being a common scold, or keeping a bawdy house, where the crime consists of a repetition of frequent acts, it is sufficient to charge the defendant in general as a common barrator, etc. (Bouvier Dic., Verb. Indict.; 4 Bac. Ab. 310, 312.)

Opinion of the Court—Deady, J.[March,

Now, the first count in this indictment charges the defendant, in the language of the statute, with carrying on the business of a retail liquor dealer at a certain place and between certain dates. The circumstances which constitute him such a dealer between May 1, 1870, and February 14, 1871, may be various and oft repeated, but their essential character is necessarily implied in this description of the offense. One dealer may sell spirits, another wine, and another beer; the first may sell by the drink, the second by the bottle, and the third by the gallon, but these are mere accidental differences, and in no wise affect the essential and legal character of the transactions. The material circumstance is the sale, or offer to sell, of either kind of liquor in any quantity less than five gallons at the same time. The identity of the act is sufficiently established by the circumstances of time and place. Indeed, it is probable that the distinction between wholesale and retail dealers is only made in the statute for the purpose of graduating the special tax according to the business of the dealer, and that it need not be noticed in an indictment. Be this as it may, there are no circumstances under which any one can sell, or offer to sell, distilled spirits, wine or malt liquors, in less quantities than five gallons at once, without thereby becoming a retail dealer in liquor, and liable to the payment of the special tax in that behalf provided. In this respect, I think the indictment is sufficient.

The charge of being a dealer in tobacco without payment of the special tax, as stated in the second count, is not a certain description of any crime known to the law, for, as I read the statute upon the subject, it is not every one who deals in tobacco that is required to pay such special tax. For instance, neither a person whose annual sales of tobacco amount to only \$100 or less, unless such person is also "general retail dealer, liquor dealer, or keeper of a hotel, inn, tavern or eating house;" nor one who deals in leaf tobacco of his own production or that of his tenant, received for rent; nor one who sells tobacco of his own manufacture, is liable to a dealer's special tax.

"An indictment charging a man with nuisance, in respect

1871.]

Opinion of the Court—Dedy, J.

of a fact which, lawful in itself, as the erecting of an inn, etc., and only becomes unlawful from particular circumstances, is insufficient, unless it set forth some circumstances that make it unlawful.” (4 Bac. Ab. 311.) So here, the indictment should state the particular circumstances necessary to make the defendant, being a dealer in tobacco, liable to pay the dealers’ tax. As it is, for all that appears, he may or may not have been such a dealer, and therefore it is uncertain whether he committed a crime or not by the commission of the act charged. The demurrer to this count must be sustained.

The words of a statute need not be followed in describing an offense, but it is sufficient if an indictment contain terms or expressions of substantially equivalent import. It is also to be remembered, that these acts are parts of a revenue system and that this provision is remedial in its nature—intended to aid in the collection of a tax—and therefore not to be strictly construed, but otherwise. In my judgment, any person who appears to be, or for the time being is, in the possession and control of a place or building where a billiard table is kept for public use, is *prima facie* the proprietor of a billiard-room and liable to pay this special tax; and this is so, although the general property and ultimate control of the place and table, or either of them, may be in some one else.

In this view of the matter, I think the language of the indictment, although unskillful, is sufficient. An allegation that the defendant “carried on the business and occupation of keeping and running a billiard table” in a particular building is equivalent to an allegation that he carried on the business, etc., of keeping a billiard room, and that he was, for the time being, the proprietor thereof.

GEORGE R. CARTER ET AL. v. L. L. BAKER ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA,
MARCH 26, 1871.

1. **INFRINGEMENT OF PATENT.**—Whenever a party avails himself of the invention of a prior patentee, without such variation as will constitute a new discovery, there is an infringement of such prior patent.
2. **IDEM.**—An infringement involves substantial identity. If the invention of the patentee is a machine, or an improvement on a machine, the patent will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of its mechanism, which performs the same service or produces the same effect, in the same, or substantially the same, way.
3. **CHANGE IN FORM NOT NECESSARILY A CHANGE IN SUBSTANCE.**—The form or mechanical construction of a machine may be different from a prior machine, and the two still be, substantially, identical. The inquiry for the jury must, therefore, be, whether the defendant's device is, in substance and effect, a new and different thing, or a mere *colorable evasion* of the plaintiff's contrivance.
4. **COMBINATION, HOW INFRINGED.**—Where the patent is for a combination of several parts before known and used in machinery, it is no infringement to use any of the parts, where the combination is not used, or any combination of some of the parts with another, or others, substantially different from the omitted parts.
5. **MECHANICAL SUBSTITUTE IN COMBINATION.**—But if a well known mechanical substitute for the omitted part has been used in combination with the other parts, there is an infringement; for such mechanical substitute for a thing, must be regarded as the thing itself.
6. **MECHANICAL SUBSTITUTE DEFINED.**—Where, in mechanics, one device does a particular thing, or accomplishes a particular result, every other known device which skillful workmen know will do the same thing, or produce the same result, is a known mechanical substitute.
7. **EXPERTS.**—The testimony of experts is to be considered like any other testimony; is to be tried by the same tests, and receive just so much weight and credit as the jury may deem it entitled to, when viewed in connection with all the circumstances.
8. **MODELS AND MACHINES.**—Rightly understood furnish very persuasive evidence on questions of improvement and infringement.
9. **IMPROVED MACHINE MAY INFRINGE.**—Although a machine may embrace a patentable improvement on a prior patented machine, yet if it embodies such prior machine, or the patented portion thereof, there is an infringement, and the patentee of the improvement cannot lawfully appropriate the prior invention, even though his own improvement is useless without such appropriation.
10. **GREATER USEFULNESS EVIDENCE.**—Greater usefulness is a circumstance to be considered by the jury on questions of infringement, but it is not conclusive. The point must be determined upon the whole evidence.

11. **MAKING MACHINE INFRINGEMENT.**—The mere making or selling, of a patented machine, is an infringement which entitles the plaintiff to maintain an action.
12. **MEASURE DAMAGES.**—The actual damages sustained, directly resulting from the infringement, is the amount to be recovered.
13. **DAMAGES, HOW ASCERTAINED.**—The damages must be found from the evidence; not from mere conjecture without regard to evidence.
14. **PROFITS.**—The plaintiff is entitled to recover the profits realized by the wrong-doer from the infringement, as a part of the damages.
15. **CONFUSION OF RIGHTS.—BURDEN OF PROOF.**—If the party infringing has improved the machine, and a part of the profits are due to his improvement, the portion of the profits due to such improvement do not belong to the owner of the prior patent; but the burden of proof rests on the infringer to show what portion of the profits are due to his improvement.
16. **OTHER DAMAGES.**—The actual damages may be more than the actual profits realized by the infringer, as the infringer may have sold at a much lower price than the patentee would have been able, and entitled, to sell. If so, this circumstance should be considered, and the whole profits which the plaintiff would have realized, should be given.
17. **IDEM.—STOCK CARRIED OVER.**—So, also, the patentee may have been unable to sell machines manufactured, in consequence of the sales of the infringing party, and have, consequently, been compelled to carry them over. If so, the interest on the capital invested in the machines so carried over, is a proper element of damages to be considered.
18. **TWO PATENTS.—DAMAGES APPORTIONED.**—Where the plaintiff, who patents a machine, and afterwards an improvement on the same machine—his machine put upon the market embodying both inventions—sues for an infringement of the first patent only, he is not entitled to recover, as damages, that part of the enhanced price of the machine, which is due to his second patent; and the burden of proof rests upon him to show how much of the price, or profits, are due to the patent infringed.
19. **OTHER MACHINES AND PROFITS.**—Plaintiff is not entitled to recover, as a part of his damages, any loss sustained in consequence of an infringement of his patent by reason of his inability to sell *other* machines, than those embodying the infringed patent. The profits recovered must be the direct and legitimate fruits of the patent infringed.
20. **PROFITS ON ENTIRE MACHINE RECOVERED.**—The plaintiff selected certain elements and combined them into a plow which he patented. The plow could only be used as an entirety—as one machine. He had the exclusive right to make, use and vend the machine as a whole: Held, that he is entitled to recover of an infringer the profits on the whole machine.

Before SAWYER, Circuit Judge.

M. A. Wheaton, for plaintiffs.

Estee & McLaurin and *A. Rix*, for defendants.

Opinion of the Court – Sawyer, J.[March,

SAWYER, Circuit Judge, charged the jury as follows:

GENTLEMEN OF THE JURY: As you have already been informed, this is an action for an infringement of a patent in gang-plows. The plaintiffs claim that their assignor, Huie, invented a new and useful improvement in the implement named, which was not known or used by others, at the time of his invention, and which was not, at the time of his application for a patent, in public use, or on sale, with his consent or allowance.

The improvement claimed to have been made consists in the arrangement and combination of the several simple and separate parts, described in the specifications and drawings annexed to the patent, to wit: the axletree, arm E, slotted oval, spring, slide and lever, in connection with the other parts of a gang-plow, and in the application of them in the arrangement and combination indicated, to the purpose of producing the two effects, or results named; that is to say, firstly, to elevate or depress one wheel of the plow, so that the two wheels shall run upon different planes, as one upon the unplowed land, and the other on a lower plane in the bottom of the furrow, in such a manner, that, by means of the contrivance, the body of the machine, including the driver's seat, and the plows, shall still maintain a level, or horizontal, position; and, secondly, to enable the driver, from his seat, at will, and without delay or change of position, to depress or elevate the plow to the required depth in the ground, or elevate it entirely above the ground, and fix it in the required position.

The claim, and the patent, are for an arrangement, or combination of elements and devices, before known and separately used, into one improvement in the plow, by which, it is claimed, that the two results sought are more readily, expeditiously, conveniently, and better accomplished.

Your first inquiry, gentlemen of the jury, will be, whether the plaintiff's assignor first made the combination as claimed, and whether, when made, it constituted a new and useful improvement in gang-plows. Upon this point, the patent itself is *prima facie* evidence in favor of the plaintiffs. But

1871.]

Opinion of the Court—Sawyer, J.

the question is to be determined upon all the evidence in the case; and, from an inspection and comparison of the model of the plow, and its mode of operation, with those of plows before in use, and the testimony of witnesses introduced on both sides. I apprehend you will have little difficulty in coming to a correct conclusion on this head.

If you find for the plaintiffs on this point, your next inquiry will be, whether there has been an infringement on the part of the defendants. In the language of another, “An infringement takes place whenever a party avails himself of the invention of the patentee, without such variation as will constitute a new discovery. * * * An infringement involves substantial identity, whether that identity is described by the terms ‘the same principle,’ ‘same *modus operandi*,’ or any other. It is a copy of the thing described in the specifications of the patentee, either without variation, or with only such variations as are consistent with its being in substance the same thing.” No certain, definite rule can be stated by which to determine unerringly, in every case, what will amount to substantial identity. The jury, guided by general principles, must determine each case upon its own circumstances. If, however, “the invention of the patentee be a machine, or an improvement on a machine, it will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of its mechanism, which performs the same service, or produces the same effect, in the same, or substantially the same, way.”

The question is, whether the given effect is produced, substantially, by the same mode of operation, and the same combination of powers and devices in both machines; mere colorable, or evasive, differences cannot defeat the right of the original inventor. The inquiry, therefore, should be, whether the defendant's device is in substance and effect a colorable evasion of the plaintiff's contrivance, or whether it is really a new and substantially different thing. If the defendants have taken the same general plan, and applied it to the same purpose, and produced the same effect, in substantially the same mode, although they have varied the

form of construction merely, it will still be substantially, in contemplation of the patent law, the same thing; otherwise, it will not. Whether or not one machine is an infringement of another, therefore, does not, necessarily, depend upon whether the mechanical constructions are different. But the question is, whether (whatever be the mechanical construction), the later machine contains the means or combination found in the previous machine; whether, taking the structure as you find it, you see the new idea completely embodied in it. In this case, the plaintiff's patent is, substantially, for a combination of parts before separately known, and used in machinery, and, since this is so, it is no infringement to use any of the parts, where the combination itself is not used, or any combination of some of its parts with another substantially different from a third element, or part, described in the specifications of plaintiff's patent. But, if the defendants have only varied their combination, by employing well known mechanical substitutes for some one or more material elements, or parts, of the plaintiff's combination, then there is an infringement, for a mere known mechanical substitute for a thing, for the purpose of determining the question in issue, must be regarded as the thing itself.

It must be apparent to you, gentlemen, that counsel regard the question of mechanical substitutes as having an important relation to this case, even if it does not present the point upon which the principal strain in the decision of the whole case is, ultimately, to come. I, therefore, invite your special attention to that aspect of the controversy, and to the definition of these terms, which I shall now give, and as stated in other portions of the charge and instructions submitted to you.

When in mechanics, one device does a particular thing, or accomplishes a particular result, every other device known and used in mechanics, which skillful and experienced workmen know will produce the same result, or do the same particular thing, is a known mechanical substitute for the first device mentioned for doing that thing, or accomplishing that result, although the first device may

1871]

Opinion of the Court—Sawyer, J.

never before have been detached from its work, and the second one put in its place. It is sufficient to constitute known mechanical substitutes, that, when a skillful mechanic sees one device doing a particular thing, he knows the other devices, whose uses he is acquainted with, will do the same thing.

To apply these general principles to the machines in question, let us examine them for a moment.

In this, the Huie Machine (illustrating by the machine), we have the crank axletree, which is one of the parts in the combination and arrangement claimed in the patent, and consists of this whole implement, extending from the end of the spindle outside the wheel, to the outer end of the other spindle outside the wheel.

This axletree is again composed of several parts, a shaft in the middle, here, these two arms which form the cranks, and these spindles connected with the arms, upon which the wheels revolve.

That is one of the parts of the machine, composed of the several elements named.

One of the elements, this arm of the axletree, is composed of different parts, also, one of which is this slotted oval, and the other, this movable arm, called E, in the specifications, lying by the side of the slotted oval.

Another element in this combination constituting the improvement, is the lever, with the spring and slide, or catch, and the segment, which is notched, and into which the slide or catch drops for the purpose of holding the plows in their position at the desired level.

The two results effected by the combination and arrangement of these elements and parts, are, as you have already seen, firstly, by the movement of this lever backward or forward, to elevate or depress the plows to the desired level, and there fix them by the spring and slide: and secondly, by a combination of the slotted oval and movable arm, called E, to form a single adjustable arm, which can be fixed when the plow is in use, by means of which, the party using the plow, is enabled to raise or depress one wheel above or below the other, so that they shall run upon dif-

Opinion of the Court—Sawyer, J.

[March,

ferent planes, as one upon the unplowed land and the other in the furrow below, or on a side hill, without affecting the level of the body of the machine, or the plows. Those are the two results to be accomplished.

It will be perceived that this arm called E is not, of itself, fixed to the shaft of the axletree, but revolves upon the shaft like a swivel.

For the purpose of elevating the plow, a fixed arm, composed of a single straight piece of iron welded, or otherwise permanently attached to the shaft, like the other arm of the axletree, is all that is necessary, if no other result was contemplated by the combination.

But another result is contemplated to be performed, in part, by the same arm of the axletree, as that used in raising the plow, and for the purpose of that other result, only, in the combination adopted, the arm is not permanently fixed to the shaft.

A fixed arm, however, is necessary to effect the result of raising the plows, and the fixed arm is obtained by tightening a nut on the end of a bolt projecting from the movable arm called E, and passing through the slot in the slotted oval. Thus, the arm E and slotted oval, held together by the tightening of the nut, together constitute a single fixed arm—the two together constituting one of the two fixed arms of the crank axletree.

In the Sursa Plow, instead of employing the combined arm of two pieces united in the machine, as just shown in the Huie Plow, a segment arm—a single piece of iron, the outer end being in the form of a segment—is used for performing the same functions, but the segment arm acts as a single fixed arm for the purpose of effecting the result of raising the plow, and for that purpose might, also, as well be a simple, straight piece of iron.

You will perceive that the arms of these two plows are in the same relative positions, and in the Sursa Plow the segment arm is substituted for the combined arm, composed of the arm called E and the slotted oval in the Huie Plow.

In both machines, the operation of raising the plows, then, is essentially performed by an axletree with a crank at

1871.]

Opinion of the Court—Sawyer, J.

each end in the same position relatively to the rest of the plow, the arms of which are fixed, and for that purpose, might as well be a simple straight piece of iron, like the other arm in the Huie axle moved by a lever attached to the axletree. But the arm of the Huie Plow is, in fact, composed of two pieces combined, while the corresponding arm in the Sursa Plow consists of a single piece of peculiar shape, the difference in the mechanical construction, and fixing of these arms, being made for the purpose of another result, and having no reference to the operation of raising the plows.

We will now consider the arrangement with reference to the other result to be attained, viz: the elevation, or depression of one wheel above, or below, the other, so that the two wheels may run upon different planes, as one in the furrow, and the other on the unplowed land, or in plowing upon a side-hill, without affecting the level position of the plows and body of the machine.

It is to accomplish this result, that the arm of the Huie plow is composed of two pieces, the slotted oval, and the arm, called E. This is accomplished by loosening the nut on the end of the bolt projecting from this arm, E., through the slot, and sliding the bolt along through this slot the required distance, and affixing it again by tightening the nut at another point on the slotted oval.

The effect of this change, you will perceive, is, to set this arm at a different angle from the shaft from that which it occupied before relatively to the fixed arm at the other end of the axletree, and thereby elevating one wheel with reference to the other, and changing the planes upon which they respectively run.

This same result is effected in the Sursa plow by the segment arm, by taking out the spindle from one of these holes in the segment of the arm, and inserting it in another hole, at a different part of the segment, corresponding to the different point at which it is fixed in the slot of the slotted oval in the Huie machine.

You will observe that the segment arm, and the slotted oval, are both segments in the same relative portions of the

Opinion of the Court—Sawyer, J.[March,

corresponding arms of the respective plows, and that the change is made by moving the spindle along the segment of similar circles similarly situated.

If the intervening space between the two holes in the segment arm should be cut out on a circle, there would be a slot similar to that in the slotted oval. In one, the end of the bolt passes through the intervening space, in the slot, and is fixed at the required point, and in the other, the spindle is taken out of the hole and passed over the corresponding space to the other hole, and inserted again. The result in both is to change the spindle from one point in the arm to another.

The means of making these rigid are different, one being tightened by a screw, and the other fixed by means of a square hole with the spindle made square to fit it, so that it cannot turn or move. Now what is the mechanical operation by which the result of changing the planes of the wheels is accomplished in both machines?

Stated in the simplest form, I think you will find it to be this in both.

It is simply changing the spindle, upon which one wheel revolves to a different point in the arm forming one of the cranks in the axletree. To effect this purpose, both machines have a crank axletree in the same general position and form—both have an arm in the same position with which the spindle is connected.

The outer end, or part, of the arm in both, is spread out into the segment of a circle, in order to give room for changing the position of the spindle in the end of the arm from one point to another.

In one, there is a slot in the form of a segment, through which the bolt passes in making the change; in the other, there are holes at different points on a similar segment of a circle, and the spindle is changed from one to the other, and thus the spindle is changed in both from one point in the arm to the other. This is essentially the operation performed, and the result, when the change of position is made, seems precisely the same in both machines.

The only difference is, in the construction of the arm it-

1871.]

Opinion of the Court—Sawyer, J.

self, and the consequent difference in making the change, and fixing the arm after it is made.

As we have seen, the arm in one is composed of two parts, in the other of one, as already described, and I think it will be manifest to you, upon inspection of the machines, that the arm on the Sursa machine may be taken off and substituted in the Huie machine for the combined arm of that machine, and fixed by ordinary known means by an ordinary mechanic, so as to perform its functions in that machine.

But of this, you yourselves are to judge upon inspection and evidence.

It is your province, not mine, to determine that fact.

There is, undoubtedly, a manifest difference in the mechanical construction of these two arms, and the question for you to determine in this connection, is, whether the segment arm in the Sursa plow can be regarded as a known mechanical substitute for the slotted oval in analogous, or similar combinations, in machinery, as, for instance, for changing a spindle in a machine, from one point to another, and which a mechanic skilled in his art, from a knowledge of his art, and of these devices, as used in machinery, could from that knowledge, simply, upon looking at the machine, substitute the segment arm in the Sursa plow for the combined arm in the Huie plow; that is to say, are the segment arm used in the Sursa plow, and the slotted oval in the Huie plow, devices known to mechanics, as devices used in machinery, for performing similar offices, and used as substitutes one for the other—the devices, and the uses of which, mechanics skilled in their business, know, or ought to know; and could a mechanic, skilled in his trade, from a knowledge, merely, of the devices, and their uses, upon looking at the Huie machine, and seeing the slotted oval, and arm E., combined to form an arm adjustable for the purpose of changing the spindle from one point of the arm to another, substitute the segment arm for the same purpose.

Could a skilled mechanic, after the inspection of the Huie machine, and seeing the desired result and mode of accom-

Opinion of the Court—Sawyer, J.

[March.]

plishment, so far as the arm is concerned—that is to say, by changing the spindle from one point in the arm to another—from his knowledge of the devices themselves, as used in other machines, and the cases in which one is a substitute for the other, from that knowledge, merely, pass from one to the other, and substitute the segment arm of the Sursa plow for the combined arm in the Huie plow? If so, then the former is but a known mechanical substitute for the latter, and is substantially the same thing, within the meaning of the law applicable to patent rights, and the substitution of it in the Sursa plow, for the other in the Huie plow, does not constitute a new invention, or discovery, or prevent its being an infringement of the Huie patent.

I will here remark that the segment arm, as a device in this combination for effecting the change in the planes of the wheels, is not claimed as new, or the invention of Sursa, in the Sursa patent. It is, therefore, for this purpose, although used, treated as though it was old. Yet for the other purpose of elevating the plow, unconnected with the purpose of changing the planes of the wheels, the device is not needed; for, we have seen, that a simple straight arm is sufficient for that result.

As to the other portions of the machine, by which the plows are brought to the desired elevation, and fixed in the position—this lever, spring and slide, and this segment of a circle. The lever in both machines, you perceive, is placed near the seat of the driver, on his right, so that he can operate it from his seat without change of position. Both are connected with the crank axletree.

By moving the lever backward and forward, the drivers in both elevate the crank axletree upon which the plow is rested, and thus the plows, in both machines, are elevated in the same manner.

In the Huie plow, there are notches at different points along the periphery, or upper edge of the segment. Attached to the lever here, is a spring and slide, or catch.

As the lever is moved back and forth by the driver to the required position, the spring presses the slide, or catch,

1871.]

Opinion of the Court—Sawyer, J.

into the notch, on the segment, thus holding the lever in the place, and maintaining the plow at the desired elevation.

Upon the Sursa plow, also, there is in the combination a segment notched on the side, instead of on the top, as in the Huie plow. The lever, also, has a spring attached, and a catch on the side of the lever, to fit into the notch, but the catch is fixed, and the spring, instead of pressing a movable slide vertically into the notch, presses laterally upon the side of the lever, as it moves back and forth, and, in that mode, forces the catch upon the lever into the notch on the side of the segment, thus, also, holding the plows at the required elevation. Each plow then has a spring, catch, and notches in the segment, to perform the same office of holding the lever in the proper position for maintaining the plows at the desired elevation. But there is a difference, also, in the mechanical construction of these devices for performing this function in the two machines, and this is the other principal point upon which the contest hinges. The question here for you to determine, also, is, whether these different forms of construction of these devices are, or not, well known substitutes in machines for the other corresponding forms or devices used in the Huie plow.

Is the form adopted in the Sursa plow, a well-known device in mechanics for securing a lever, or for analogous purposes, as, for instance, securing the lever that operates the brake upon a wagon, and holding it in its position, so that a mechanic, well skilled in his trade, would or ought to know the device, and its uses, and by looking at the Huie machine, from his mere knowledge of his art, of the device and the uses to which it is applied in mechanics, be able to pass from the one to the other, and substitute it for that in the Huie machine, without exercising the faculty of invention, or discovery of something new, or without experimenting upon it, to ascertain whether the device would work, or not, to produce the same result. If so, then, it is but using a known mechanical substitute for one of the parts in the combination, and it is, substantially, the same thing as that

Opinion of the Court—Sawyer, J.

[March,

part, and will not protect the defendants from the charge of infringement.

But if, on the other hand, this is not a device known in mechanics, for accomplishing similar results in machinery, and would require the discovery of something new, the invention of something not before known, or before used in machinery for any similar, or analogous purpose, then its contrivance and application to the purpose indicated, is not the mere substitution of a known mechanical substitute, and is not an infringement.

Gentlemen of the jury, we have, then, two plows, of about the same dimensions, of the same general construction and appearance, both carried on two wheels. Each has a bent axletree located in the same general position, which axletree, when considered with reference to the result of raising the plow, with both wheels running on the same plane, is composed of a shaft, two fixed arms of equal length at right angles with the shaft, and parallel with each other, and a spindle, fixed in each arm, upon which the wheel revolves. The revolution of this shaft, by means of a lever, operates in both precisely the same way, to raise and depress the plows. With reference to the other result, of changing the planes of the wheels, this is effected, in both, by changing the spindles upon which the corresponding wheels in the two machines revolve, from one point to another, and fixing them there, in the corresponding crank-arms in the two axletrees.

When the spindles are thus changed and fixed, the two effects of changing the planes of the wheels, and raising or lowering the plows, are performed by both machines in precisely the same way. The arms of the axles, in both machines, used for effecting the changes in the planes of the wheels, as arms only, are in the same position, and perform all their functions with reference to both results, as simple arms, exactly alike. .

The arms, as simple, single arms, are similar in shape, both of them spreading out, like a fan, into a segment of a circle at the outer end, so as to give room for a change of the position of the spindle from one point to the other, for the purpose before indicated.

But the mechanical construction of the arms is different, one being composed of two parts combined to form a single fixed arm, and the other of one; and the modes of changing the spindles from one point to another, and fixing them, are different. The levers and the plows are fixed in the desired positions by means of a notched segment, catch, and spring, in both plows, but of different mechanical construction.

These, when the machines are analyzed, I apprehend, will be found to constitute the only differences between these plows, so far as the questions for you to determine are concerned; and it is for you to determine, whether these differences are substantial, or are only formal, and evasive, arising from employing in the Sursa plow, in the place of those specific parts, or devices, of Huie's combination, other known mechanical substitutes therefor. If substantial, then there is no infringement; but, if merely formal and evasive, and not substantial, there is an infringement.

These are the questions, gentlemen of the jury, for you to determine from the evidence.

The testimony of the experts which has been introduced, you are to consider like any other evidence. You are to try it by the same tests that you apply to the evidence of other witnesses, and give it just such credit and weight as you deem it entitled to, from all the circumstances, and no more. You have the models of the various machines before you. These, I think, are readily comprehended, and rightly comprehended, they afford very persuasive evidence.

If, from the whole evidence, you are satisfied that the difference between the Sursa and Huie plows are mere changes of forms, accomplished by substituting, in some of the parts of the combination, mere well-known mechanical substitutes, without any substantial alteration in their real structure, then the plaintiffs are entitled to a verdict on this point. If, on the contrary, they are substantially different combinations of mechanical parts to effect the same purpose, then you must find for the defendants as to these points. It rests with you, gentlemen, to determine these questions of fact, from the entire evidence before you. The law you will take from the Court; the facts you will determine yourselves.

Opinion of the Court—Sawyer, J.

[March,

I will add that it does not necessarily follow, because a subsequent machine is better than or an improvement on a prior patented machine, that it is not an infringement. It may, or may not, be an infringement, depending upon whether the better or improved machine embodies the old machine. It may contain the whole substance of the first machine, and something more, or be constructed of an improved material, which renders it better and more useful, and makes it the subject of a patent in these particulars. Yet, if it embodies the prior machine, or combination, or improvement, or the patented portion of it, there is an infringement, and the inventor of the improved machine cannot appropriate the prior invention without being liable for infringement, even though his own improvement is useless without such appropriation of the prior patented machine, or patented part of the machine.

The greater usefulness of a machine, the jury is entitled to consider, as a circumstance tending to show a different construction, but not conclusive, and whether the new machine is substantially different from the old, must be determined upon all the evidence bearing upon the point.

These are the only points, except on the question of damages, upon which I deem it necessary to give you any special instructions. Upon the other points in controversy, not specially referred to, if any there be, I think you will find no difficulty in reaching a correct conclusion.

I have not designed to express, or intimate, my own opinion upon controverted facts, although it would not be improper for me to do so with proper caution. But if you should imagine that you perceive any intimation of my opinion upon the disputed questions of fact in issue, whether you do or not, you are not to be controlled by such intimation; but you are to determine all disputed facts for yourselves from all the evidence in the case. The ascertainment of the facts is the exclusive province of the jury.

If you find for the plaintiffs on the question of the validity and infringement of their patent, it will be necessary for you to find the amount of damages sustained.

On this point the verdict should be for the actual dam-

1871.]

Opinion of the Court—Sawyer, J.

ages, which the evidence shows the plaintiffs to have sustained in consequence of the infringement of their patent by defendants—the damages directly resulting from the infringement. That will be the rule of damages. You will ascertain the amount, as near as you can, from the evidence before you. The damages must be found from the evidence, not from mere conjecture independent of the evidence.

The mere making of a machine, or the selling of a machine to others to use, or the use of a patented machine, is an infringement of the patent. Of course, for the mere making, without selling, or using the machine, the damage would be nominal; but still it is an infringement, and if nothing else was done, the holder of the patent would be entitled to recover nominal damages. But, in this case, large sales are shown to have been made by defendants, since the plaintiffs became the owners of the patent, and the damages alleged are large; and if there is an infringement, the plaintiffs are entitled to recover the whole amount of damages proved to have been sustained, be it large or small.

Evidence of the amount of damages has been given by the plaintiffs, and from the evidence you must determine the damages sustained. The profits made by the defendants in selling the machines are proper to be given, as a part of the damages; for the right to make and vend the patented machine, being the plaintiff's property, the profits resulting from the sale of it, ought to belong to them. But as mere profits, the plaintiffs are only entitled to the profits of the sale of their machine, as patented. If the defendants have improved their machine, and if any of the profits are properly credited to defendants' improvement, they do not belong to the plaintiffs; but as the defendants have wrongfully connected the plaintiffs improvement with their own, and they caused the confusion of rights, if any portion of the profits are properly to be credited to the defendants' improvements, the burden rests upon them to show affirmatively that fact, and how much of those profits ought to be credited to this improvement and deducted from the profits of the sale of the whole machine as improved.

You are also entitled to take into consideration the fact

Opinion of the Court—Sawyer, J.

[March,

that the plaintiffs, by the infringement, may have sustained other damages beyond the profits actually received by the defendants.

The plaintiffs may have chosen to sell at a higher rate, and they were entitled to sell at a higher price, if they were able to get their plows off in the market at higher prices.

But, with reference to this question, the jury should, also, take into consideration the probabilities, as developed by the evidence, as to whether, if the defendants had not infringed the patent, the plaintiffs would have been able to sell as many machines at a higher price, or as many at any price, as have been sold by both plaintiffs and defendants together.

So, also, if the plaintiffs have manufactured machines, under the infringed patent, which they could have sold but for the acts of defendants in unlawfully selling the same machine, and which in consequence of such unlawful acts of defendants, they were unable to sell, and were compelled to carry over, they would also be damaged to the extent of the value of the use of the capital invested in such manufactured machines, during the time they were compelled to carry them in consequence of such unlawful acts of the defendants.

If further improvements have been made in the plaintiffs' machines, and subsequently patented, and if the plaintiffs, during the time of the alleged infringement, manufactured and put upon the market plows embodying the first patent, and, also, the improvement covered by the second patent, they are not entitled to recover, as damages, that portion of the price which they might have obtained that is due to the greater value of the machine occasioned by combining the last improvement with the first.

The plaintiffs have sued only, for infringement of the first Huie patent, and their recovery must be limited to the damages arising from the infringement of that patent alone, and the part of the price for which they could have sold due to that patent alone, is all that the jury can take into consideration on this branch of the damages. And I will further add, that if the plows claimed to have been carried over by plaintiffs, in consequence of the infringement

1871.]

Opinion of the Court—Sawyer, J.

by defendants, did not embody in their construction, the patent infringed, then the plaintiffs are not entitled to recover, as a part of their damages, for the use of the capital invested in their construction, nor in any event are they entitled to recover for the use of so much of the additional cost of the plow, if any there be, due to introducing the further improvement made under the second Huie patent.

The plaintiffs are not entitled to recover, as a part of the damages, any loss sustained by reason of their inability to sell the Pfiel plows, or any other plows than those made under or embodying the patent infringed. Their profits must be the direct and legitimate fruits of that patent.

They may have sustained damages from this source, but they are too remote.

It rarely happens, that all the damages, incidental and remote, resulting from a wrongful act, are permitted to be recovered by the law. Only those damages which directly and immediately flow from the wrongful act, can be considered. Remote consequential damages must be discarded.

I instruct you, therefore, that you will not include damages resulting from the dealing of the plaintiffs in other machines than those embodying the patent infringed—the first Huie patent. And whether these machines carried over by plaintiff embodied that patent, and, to what extent the loss sustained by carrying them over, is due to that patent, and what to the additional cost of improvements introduced under the second patent, are for you to determine, so far as you can, from the evidence.

The burden of showing the extent of the damage, if any, arising under this, as under other heads, is on the plaintiff.

Defendants insist that, as the plaintiff's grantor only patented the improvement of a plow, they are, therefore, only entitled to recover the profits due to the particular improvement, and not the profits on the whole plow.

But, gentlemen, the patent is not for an improvement on any one specific, or particular plow. It does not appear that any particular plow was selected, and an improvement made on that plow.

But the patentee, so far as appears from the evidence, selected certain elements before known, and combined them

and applied them to other parts of a plow constructed after his own fashion, and made the plow in question as a whole.

The plow as constructed is his machine. It does not appear, that that particular plow could be employed for any useful purpose without his improvement connected with it.

Beyond the mere profits of manufacturing the machine, the profits in the plow must almost necessarily be all due to the patent for the improvement. It is that which fixes the price beyond the expense of manufacturing. At all events, the holder of the patent, alone, is entitled to make, use and vend the machine as a whole, and he must, therefore, necessarily, be allowed the profits on the whole machine.

In my judgment, from the attention I have been able to give this point since it was raised, if there is an infringement, the plaintiffs are entitled to recover the profits made upon the entire plow, and not merely on the part constituting the improvement. If I am wrong, the error, as well as any other errors I may commit, will be corrected elsewhere.

Gentlemen, I do not know that I can say anything further to aid you in arriving at the proper amount of damages. You must take the evidence as you find it, and consider it in the light of the principles I have just stated, and fix the amount from the evidence, according to the best of your ability, remembering that the plaintiffs are entitled to recover, if at all, the full amount sustained resulting directly and immediately from the infringement, and no more.

You will find the damages for two periods: Firstly, from the fifth of January, 1869, to the twenty-seventh of September, 1869; and, secondly, from the fifth of January, 1869, to the present time. The latter will, of course, be arrived at by adding to the damages for the first period, the amount accruing since September 27, 1869.

If you find for the plaintiffs, your verdict will be: We, the jury, find for plaintiffs, and assess the damages from January 5, 1869, to September 27, 1869, at — dollars, and the damages from January 5, 1869, to the present time, at — dollars.

If you find for defendants, you will simply say: We find for defendants.

1871.]

Opinion of the Court—Deady, J.

THE UNITED STATES *v.* JOHN BROWN, PAUL OBERHIEM,
JOHN GASSEN, THOMAS B. SCOTT, SAMUEL ADOLPH,
HENRY HEYMAN, DANIEL WAGNON, AND WESLEY
GRAVES.

DISTRICT COURT, DISTRICT OF OREGON.

MARCH 27, 1871.

1. **MOTION TO QUASH INDICTMENT.**—A motion to set aside or quash an indictment will not lie unless the objection appear upon the face of the indictment.
2. **INDM.**—An affidavit of a defendant that he believed the grand jury acted upon incompetent or insufficient evidence in finding an indictment against him, not allowed on a motion to quash.
3. **NO DEFENDANTS BEFORE INDICTMENT FOUND.**—There are no defendants or co-defendants to an inquiry before the grand jury, until the indictment is found and filed in Court.
4. **WITNESS COMMITTING HIMSELF.**—Under the act of February 25, 1868 (15 Stat. 37), a person may be compelled in a judicial proceeding to testify to matters tending to criminate himself, but no use can be made of such testimony against the witness in a criminal proceeding.
5. **ACT JULY 6, 1862, CONSTRUCTION OF.**—The act of July 6, 1862 (12 Stat. 588), only extends the thirty-fourth section of the judiciary act to cases in equity and admiralty, and does not include criminal actions or proceedings.

Before DEADY, District Judge.

John C. Cartwright, for plaintiff.

Walter W. Thayer and *W. Lair Hill*, for defendants.

DEADY, J. On March 17, 1871, the Grand Jury of this Court found an indictment against John Brown and seven others for corruptly impeding the due administration of justice, in this Court by advising, causing and procuring one Morris Graves, a material witness in a criminal charge against said Brown, pending before said Grand Jury, to secrete and absent himself, so as to avoid being served with a subpoena, then issued out of this Court to require and command the attendance of said witness before said jury.

The indictment is found under section 2 of the act of March 2, 1831 (4 Stat. 488).

At the foot of the indictment the names of persons are inserted or endorsed as the witnesses examined before the Grand Jury in accordance with the practice prescribed by the Criminal Code of the State, six of whom appear to be the same persons as six of the defendants in the indictment.

One of the defendants, upon being arraigned, pleaded guilty to the indictment, one of them has not been arrested, and the other six have filed two motions, one by Brown and the other by the other five, to set aside and quash the indictments, which have been argued and submitted together.

The motions are substantially the same, and are made upon the following grounds:

I. That the Grand Jury compelled six of the persons named in the indictment to appear before them and testify against their will, and acted upon the evidence so obtained in finding said indictment.

II. That for the purpose of finding said indictment the Grand Jury received incompetent testimony, to wit: that of the defendants aforesaid.

III., IV., V. and VI. That the indictment is not direct and certain as to the crime charged, or as to the necessary circumstances thereof, and that the indictment does not charge a crime nor do the facts stated constitute one.

In support of these motions, counsel for defendants have read the separate affidavits of four of the defendants:—Paul Oberheim, John Gassen, Thomas B. Scott and Samuel Adolph, each of which is substantially to the effect, that affiant appeared before the Grand Jury which found this indictment in obedience to a subpoena served upon him, and there gave evidence “regarding the charges for the purpose of said indictment,” and as affiant believes, said evidence was used by said Grand Jury upon which to find this indictment against affiant and the other defendants therein.

Under the Code an indictment cannot be attacked by motion except as provided in section 115, which enacts, that it must be set aside on motion of the defendant when it appears that “the same has not been found, endorsed

1871.]

Opinion of the Court—Deady, J.

and presented as prescribed in Chapter VII.," or when the names of the witnesses before the Grand Jury are not placed upon the indictment. (Or. Code, 460.)

It must be admitted that these motions, styled both motions to set aside and to quash, do not come within the scope of this provision. For aught that appears and indeed from what appears, the indictment was found by the concurrence of the requisite number of grand jurors. The names of the witnesses are endorsed upon it, and it is properly endorsed "A True Bill," and signed by the foreman, and was by such foreman, in the presence of the Grand Jury, duly presented in open Court and filed with the clerk as a public record.

As I understand it, the Code does not allow any inquiry by the Court as to the sufficiency or competency of the testimony upon which a Grand Jury has acted in finding an indictment, for the purpose of setting it aside.

So at common law, a motion to quash an indictment was only allowed for such insufficiency in the body or caption of it, as would make a judgment upon it against the defendant erroneous; and even then it was in the discretion of the Court either to allow the motion or oblige the defendant to plead or demur. (4 Bac. Ab. 342.)

Neither the motion to set aside or the motion to quash will lie where the objection does not appear or arise upon the face of the indictment, or perhaps the records of the Court. This being so, the affidavits of the defendants impugning the conduct and judgment of the Grand Jury, can not be considered upon the hearing of this motion. If the contrary practice were established, there would be no need of grand juries, and the Court would necessarily assume both the function of indicting and trying criminals; for it is safe to presume that in most cases the defendant would object to being tried upon the indictment, and support such objection by his affidavit that he believed the Grand Jury acted upon incompetent or insufficient evidence. The wit of man could not devise a mode of indicting which would not be liable to this objection from the defendant. In the administration of criminal justice, confidence must be re-

Opinion of the Court—Deady, J.

[March,

posed somewhere; and it must be admitted that there are few bodies concerned in it, that may be more safely trusted than the grand juries of this district. The material allegation of each of these affidavits, that the affiant believes the Grand Jury acted upon his evidence in finding the indictment against himself and co-defendant, is quite as likely to be false as true, because the affiant has no means of knowing the fact. Nor does it appear that the affiants gave any material testimony in the matter. They do not say that they confessed their guilt, or that of their fellows, before the Grand Jury. Upon this point I cite and rely upon the opinion of Mr. Justice Nelson in *United States v. Reed*, (2 Blatch. 464), and the authorities there cited, in which case a motion to quash upon a similar affidavit of the defendant was denied.

Laying aside then, the affidavits of the defendants, what objection appears to the manner of finding this indictment upon the face of it? It is answered that, it appears that each of the six defendants whose names appear as witnesses upon the indictment, was a witness against himself and against his co-defendants, and that, therefore, the indictment was found upon incompetent testimony. Is this conclusion from the premises a certain or even a probable one? In the investigation of this matter ten persons appear to have been before the Grand Jury and examined as witnesses. Upon the testimony of which one of them this indictment was found, as to any or all of the defendants, this Court cannot know or presume. There is no presumption that all of them or any particular one of them gave material or any testimony before the Grand Jury. There had been no preliminary examination before a commissioner concerning the commission of this alleged crime. The investigation originated with the Grand Jury, as was lawful and proper. In endeavoring to find out who, if any, were probably guilty of impeding the administration of justice by running off and secreting the witness who had failed to appear before them, they might call before them and examine many persons who were ignorant, or affected to be, about the matter, and the testimony of others might establish the fact that some of

1871.]

Opinion of the Court—Deady, J.

these same persons were the very ones who should be indicted. For instance, this indictment, for aught that appears, may have been found upon the testimony of the three witnesses not named as defendants therein. But for the sake of the argument let it be assumed that each of these six defendants who were before the Grand Jury gave material testimony against the other five, would the indictment against these six, or either of them, have been found upon incompetent testimony? I think not. Each of these parties might have been compelled to testify before the Grand Jury concerning the part, if any, which each of the others took in this alleged criminal transaction.

The argument to the contrary by the counsel for defendant is based upon section 211 of the Code, which enacts that—

“A defendant in a criminal action or proceeding cannot be a witness for or against himself, nor for or against his co-defendant.” * * * (Or. Code, 477.) And also section 48, which declares that—

“In the investigation of a charge for the purpose of indictment, the Grand Jury shall receive no other evidence than such as might be given on the trial of the person charged with the crime in question.” (Id. 449.) And the assumption that these parties were defendants and co-defendants in a criminal action or proceeding before the finding of the indictment, and during the investigation of the matter before the Grand Jury; and that the inquiry before that body was the investigation of a criminal charge made against each of these particular six defendants.

I cannot conceive of any one being a defendant until some distinct action or proceeding known to the law has been commenced against him, to which he then becomes a party, and in which he is entitled to be heard as soon as he is brought into Court or chooses to appear. Section 11 of the Crim. Code provides substantially that a criminal action is commenced when the indictment is found and filed with the clerk. So in *United States v. Reed*, cited above, it was held that while an investigation was going on before the Grand Jury touching a particular charge, there was no cause pend-

Opinion of the Court—Deady, J.

[March,

ing in Court or before that body in the legal sense of the term. There are, in fact or law, no defendants or co-defendants to an investigation before a Grand Jury touching an alleged or supposed commission of crime.

Neither was the Grand Jury investigating a criminal charge made against these particular six defendants within the meaning of section 48 of the Code. Neither of these defendants was charged with the commission of a crime until after this investigation had ceased, and the indictment was filed in Court. Then for the first time in a legal sense they were accused of the commission of a crime. Section 48 only applies to cases when a party has been duly charged with the commission of crime before a committing magistrate and held to answer. In such a case the Grand Jury are called upon to inquire whether the defendant in this criminal proceeding before the magistrate is *prima facie* guilty, as charged, and indorse the indictment accordingly. But in a general inquiry instituted by a Grand Jury for the purpose of ascertaining who committed a particular crime, or whether a crime was committed at all, it would be impossible to apply section 48, without stopping the inquiry at the threshold. The Grand Jury cannot know at once who will be the person put on trial for the crime, and who will be his co-defendants if any, and therefore cannot know if the testimony of either would be incompetent on the trial on that account, and for that reason not to be received by them on the investigation.

By act of February, 25, 1868 (15 Stat. 37), it is provided that no evidence of a party obtained in a judicial proceeding shall be used against such party in any Court in the United States, in any criminal proceeding or proceeding to enforce a forfeiture or penalty. As the law stood before the passage of this act, a witness could decline to answer a question when the answer would tend to criminate himself. But now he may be compelled to answer, when inquiry is pertinent to any judicial proceeding, because it may be necessary to the ends of justice as to others, and cannot be used against himself. If this is not the object and effect of the act, I confess I do not know what is.

This being so, the Grand Jury might have interrogated each of these defendants concerning the part he took in this transaction, if any, but they were not authorized to find an indictment against either of them upon his own testimony. But either might be indicted upon the testimony of the other, and if any of them saw proper to volunteer a statement or confession of his own guilt to the Grand Jury, he might be indicted upon that. I see no reason why a party may not as well confess his crime before a Grand Jury, as before a Court, as one of the defendants in this indictment has already done. But when a person is called before a Grand Jury as a witness, and it is subsequently sought to prove a confession, alleged to have been made by him whilst before such body, to sustain an indictment found against such person, I think it ought to be received with great caution, and rejected unless it satisfactorily appeared that it was deliberately and voluntarily made, and not inadvertently or from the supposed constraint of his position or the obligation of his oath. The National Constitution (V Amendment), has wisely and humanely established beyond legislative control and popular caprice or necessity, the common law rule, that “No person shall be compelled, in any criminal case, to be a witness against himself.”

Much was said upon the argument of this branch of the motion as to whether the sections of the Code above cited, touching the competency of witnesses in criminal actions are applicable to and govern in such actions in this Court. The defense maintained the affirmative of the question and relied upon the act of July 6, 1862, (12 Stat. 588), which enacts that:

“The laws of the State in which the Court shall be held, shall be the rules of decision as to the competency of witnesses, in the Courts of the United States in trials at common law, in equity and admiralty.”

Prior to the passage of this act, the State law as to the competency of witnesses in the United States Courts was the rule in “trials at common law” by virtue of section 34 of the Judiciary Act of 1798 (1 Stat. 92), but not in equity or admiralty. So far as I can perceive, this act is pros-

pective, and was passed to produce uniformity in this respect in trials at common law, equity and admiralty. Practically it extends the Judiciary Act to cases in equity and admiralty. At first blush, it would seem that the phrase trials at common law was comprehensive enough, and intended to include the trial of criminal actions. But in *United States v. Ried et al.* (12 How. 362), Ch. J. Taney held that this phrase in the section of the Judiciary Act above cited, did not include criminal actions, but only "civil cases at common law as contradistinguished from suits in equity." While admitting the propriety and necessity of the rule of following the State law as to the competency of witnesses in civil actions, because it is in effect a rule of property, the Ch. J. said: "But it could not be supposed, without very plain words to show it, that Congress intended to give to the States the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another."

Upon authority, I think the case conclusive that the act of July 6, 1862, does not apply to criminal actions. However, in my judgment, that consideration does not affect the question arising upon this motion, for I regard the Code in this respect as nothing more than an affirmance of the common law, and therefore the rule of this Court.

The motion to quash upon the first and second grounds, must be denied.

As to the other grounds of the motion, the objection should regularly have been taken by demurrer, but by consent the defendants have been permitted to make and argue them in this way. On the argument, I was not much impressed with the force of the objections, but am not prepared now to say they are not well taken. Being pressed for time, I have not been able to give them the consideration I would like, I shall, therefore, deny the motion altogether, and if it becomes necessary, these objections to the sufficiency of the indictment, may be made in arrest of judgment.

1871.]

Opinion of the Court—Deady, J.

CHRISTIAN HANSON v. FRANK FOWLE AND A. F.
TURNER.¹

DISTRICT COURT, DISTRICT OF OREGON,
APRIL 3, 1871.

1. **ASSAULT AND BATTERY OF OFFICER, WHEN MASTER LIABLE FOR.**—A master of a vessel is liable for an unjustifiable assault and battery by one of his officers upon one of the crew, when the same is done by his connivance, consent or authority.
2. **IDEM.**—The consent and authority of the master will be presumed when it appears that he knew of the trespass or had reason to know it, and did not interfere to prevent it.
3. **IDEM—SATISFACTION, PROOF OF.**—A receipt given by a seaman upon the payment of his wages, which contains a clause acknowledging satisfaction of all claims for assault and battery, is not binding unless shown to have been the result of a fair and free compromise or settlement for some substantial compensation or benefit to the seaman besides the payment of his wages.
4. **IDEM.**—A receipt for all “demands and dues” against a vessel, her master and officers is not upon its face a receipt for assault and battery.
5. **RECEIPT FOR CLAIMS EX CONTRACTU, AND CLAIMS EX DELICTO.**—The word “demand” on a receipt ordinarily relates only to claims arising *ex contractu*, and not to those arising *ex delicto*.
6. **MEASURE OF DAMAGES.**—Rules for assessment of damages in cases of beating and wounding a seaman.

Before DEADY, District Judge.

Theodore Burmeister and H. Y. Thompson, for libellant.

J. W. Whalley, for defendant Turner; *Orlando Humason*, for defendant Fowle.

DEADY, J. Christian Hanson, lately a seaman and second mate on the American brig *Madawasca*, brings this suit against the respondents, the master and mate of said brig, to recover damages for an alleged beating and wounding by the latter, with the consent of the former, about August 8, 1870, during a voyage from Newport, Wales, to Portland, Oregon.

The libellant and the respondents have been examined as

1. Affirmed on appeal in the Circuit Court, May 12, 1871; SAWYER, J.

Opinion of the Court—Dedy, J.

[April,

witnesses, also two of the seaman, and the cook and the cabin boy. The arm of the libellant, which it is alleged was fractured by the beating, was exhibited in Court, and the testimony of physicians heard as to the nature of the injury and its probable cause and consequences.

The testimony is too voluminous to be detailed here. It appears that when the brig was in the South Atlantic, the libellant was at the wheel during the morning watch, steering by the wind, the same being light and varying about five points on either side. Near six o'clock the ship was thrown into stays, but no harm was done by it except the stranding of the main sheet, which was not discovered, however, until after the beating in question. When the ship was thrown into stays, the master came on deck, and abused Hanson on account of it. Hanson replied that he couldn't help it. The mate immediately with the rest of the watch, braced the yards on the other tack, and then went forward with one man to haul down the foretack. Just at this time—near six o'clock—the libellant's watch at the wheel being about out, the master ordered O'Neal to take the wheel, and the libellant to go forward and help the mate about the foretack. As soon as the libellant got forward near the capstan, words passed between the mate and him about the ship being thrown into stays—the mate abusing the libellant, and finding fault with him about it, and the latter answering, "Mr. Turner, I couldn't help it." Very soon the mate commenced beating the libellant, and knocked him down near or on the combing of the fore hatch and then kicked—booted him—aft to the companion way.

The libellant testifies that the mate struck him six times with a capstan bar. That the first three blows he received on his arm in attempting to ward them off from his head and body, and that then he was knocked down and struck on the lower part of the back three other blows with the bar. That then the mate ordered him aft, and as he went stooping along from the effect of the blows, on his two feet and one hand, the mate kicked him in the back and sides until he reached the companion-way where the master was standing.

1871.]

Opinion of the Court—Dedy, J.

The mate denies having struck the libellant with the bar, but admits striking him with his fist and knocking him down, and that he kicked him with his bare foot, and also struck him with his fist as he passed him as they were both going aft. The mate also testifies that the libellant was impudent to him and pushed him against the anchor, and that he was provoked to beat him on that account. No one saw the men during the affray at the capstan, but the libellant was heard to scream and say, "I couldn't help it." There is no doubt but that his arm was broken on that occasion, and the weight of testimony tends to support the story of the libellant. This being so, the beating was unprovoked and unjustifiable. It does not, however, necessarily follow that the mate intended to break libellant's arm, but he beat him unlawfully and, I think, unmercifully, and he must be held responsible for the consequences of his conduct and actions.

The master denies knowing anything about the matter, or that he had any knowledge that the libellant was injured while on the vessel. I think the testimony strongly preponderates in favor of the conclusion that the master was cognizant of the beating, and did not interfere to prevent it but on the contrary, suffered and approved it. Notwithstanding the attempt to prove the contrary, I am satisfied that the master was on deck, probably on the poop, at the time. True, on account of the ship's house, he might not have seen the parties at the time libellant was knocked down and had his arm broken, but he must have heard enough of the affray then to have called his attention to it. At least, as the libellant came aft crying with pain, and the mate booting him, he must have seen them. Besides, it is admitted that the master came on deck immediately after the libellant and mate came aft, and that he saw the former crying from the effects of the beating, and that he made no inquiry into the matter nor noticed it otherwise than to put him to work splicing a thimble in the main sheet, and when he complained that his arm hurt him so he could not work, to tell him "to shut up."

There can be no doubt that the libellant carried his arm in a sling for several weeks, probably as many as six, dur-

Opinion of the Court—Deady, J.[April,

ing which time, although he stood his watch, he did not take his turn at the wheel on account of the fracture of his arm.

The voyage did not terminate for near five months afterwards, and yet no inquiry was ever made into the matter by the master, and the broken arm was allowed to go uncared for and to heal as best it might.

This subsequent utter indifference and neglect on the part of the master tends to convince me that he was aware of the beating when it occurred and approved it. Indeed it is not improbable that he sent the libellant forward to where the mate was when he did, for the purpose of giving the latter an opportunity of punishing the former for letting the ship come into stays. The testimony of one witness is that he was walking the poop cursing and swearing about the matter, at the time the battery was being committed. According to the libellant's testimony, as soon as the master came on deck he railed out at him, calling him a "Dutch hound of h—ll." So the testimony of others of the crew is to the effect that he was in the habit of telling the mate "to make the men move, and if they didn't, to mash their heads," and that on one occasion he beat one of the men himself over the back with a broom-stick, for no particular cause as appears.

The law upon the liability of the master for the trespasses of his officers is laid down by Mr. Justice Story in *Thomas v. Law* (2 Sum. 11), as follows:

"The master has the supreme authority on board of his ship; and has, moreover, a sort of parental responsibility and duty devolved upon him, for the due exercise of it. It is his duty to prevent, as far as he may, any undue exercise of authority by his subordinate officers, and any abuses, injuries and trespasses by them. If he is present when any of the subordinate officers inflict chastisement upon the crew, he is bound in duty to interfere, and restrain it, if it is improper in its nature or character, or unjustifiable under the circumstances. If he may interfere, and he does not, he must be deemed to assent to and encourage it; for no officer in his presence has any right to inflict punishment

1871.]

Opinion of the Court—Deady, J.

without his assent or direction, unless upon an emergency, which admits of no delay. It is not sufficient for him to excuse himself from this interposition, upon any notions of courtesy, or of upholding the authority of the officers, or of supporting the harmony and discipline of the ship. The law has entrusted him with summary powers, for the good, not of the officers alone, but of the crew also, and, indeed, for the general good of the maritime service, in which he is engaged. While he should uphold the just discipline of the ship with a steady confidence, he is to take care that the crew is not made the victims of the insolence, the passions, or the caprice of the officers under him. If he will stand by and see the seamen cruelly, brutally and unjustifiably beaten without interference, he ought not to complain that the law forces upon him the conclusion that he approves what is done, and means to encourage it by his license and authority. He becomes thereby the abettor and supporter of the deed, upon the reasonable ground that he who knowingly allows oppression shares the crime. Such, in my opinion, is the dictate of the law on the subject; and it is wholesome as an admonition and a preventive against the undue resentment and oppression of officers, which so often end in the open mutiny and rebellion of the injured crew."

Upon this branch of the case I think the libellant is entitled to recover against the master as well as the mate. To my mind, it is absurd to suppose that within the limited area of this vessel, carrying a crew of only six men, that the mate could in open daylight and without any substantial cause, severely beat one of the men, fracture his arm, and boot him from fore to aft, without the master being aware of it at the time or soon after. If for any reason he did not see the transaction at the moment of its occurrence, and it had not been allowed to take place by his connivance, consent or authority, he would most naturally inquire into the circumstances as soon as the matter came to his knowledge and take some steps to rebuke or punish the offending officer, and to bind up and heal the wounds of the injured seaman. Not having done this, the inference is reasonable that he approved of the mate's conduct at the time.

Opinion of the Court—Deady, J.

[April,

An attempt is made in the pleadings and proof by both respondents to set up a receipt given by the libellant to the master one or two days after the arrival of the vessel at this port, in bar of this suit. It is in these words.

“Received from F. Fowle, the sum \$93.96, being the amount in full of all demands and dues against brig *Madawaska*, her officers, captain and owners.

(Signed)

“CHRISTIAN HANSON.

“Portland, January 17, 1871.”

There is no direct testimony to show that the sum mentioned in this receipt was paid the libellant for his wages only, but the fact is manifest from all the circumstances as well as from the testimony of the master himself. He testifies that within a day or two after his arrival at this port, he sent for the men to pay them off, and that the libellant was the first man in the cabin. “I (the master) asked him (Hanson) if he had made up his account? He said he had not. I told him I had, and read it to him, and asked him if it was right. He said it is. Then I gave him the money, and he signed the receipt.” On cross-examination, he testified further: “I did not suppose there would be any claim for damages. I did not think of anything of the kind at the time.”

The general rule is that the word demand in a receipt relates only to claims arising out of contract, and does not include those arising out of tort, such as this. The word damages nor any equivalent of it, does not occur in the receipt, and the master did not think of any such a thing when he took it. Upon these facts alone it would not be held to be a release or acquittance of this claim. But this is not all. This voyage lasted seven months and twelve days. The only place that the vessel touched on the way was the Falkland Isles, where she remained a few days to ship three men in place of three of the crew lost overboard. It is highly probable that the whole wages for the voyage were due the libellant when he signed this receipt. Dividing the sum received by the time of his voyage, gives as a result, a little over \$13 per month. It is not probable that the wages were less than this sum. Considering these

1871.]

Opinion of the Court—Deady, J.

facts, the nature of the subject, and the relation of the parties, it is apparent that the receipt was neither given by the libellant, or received by the master with any reference to this claim for damages.

But if this receipt contained the word “damages,” or “all claims for damages,” the law would not allow the respondents to take advantage of it to defeat this suit, unless it also satisfactorily appeared that after a fair and distinct understanding of the matter, the libellant compromised or settled the claim for, or on account of some substantial satisfaction, compensation or benefit made to, or to enure to him.

The law very properly looks with distrust and suspicion upon a release or receipt obtained from a seaman at or before the payment of his wages, for injuries inflicted upon him during the voyage. While the wages are unpaid, the master and men deal upon such an unequal footing, that no attention will be paid to such release when there is any ground for suspecting that it was unduly or unfairly obtained.

In *Whitney v. Edgar* (Crabbe, 424), the Court held that no attention should be paid to a release of the officers of a ship from all claims and damages, given by a seaman to procure the payment of his wages. In *Thomas v. Lane*, cited above, there was a receipt signed by the seaman on the back of the shipping articles, in full of all demands for assault and battery and imprisonment. In passing upon it, the Court said: “To such a receipt, given upon the mere payment of wages, and without any distinct compromise, satisfaction, or compensation for trespasses, it can hardly be supposed that any Court would listen as a bar to a suit of this nature. It must, under such circumstances, be treated as a paper obtained by fraud, surprise, or under advantage taken of the party’s situation.”

The damages claimed in the libel are \$2,000. In estimating the damages to be allowed libellant, regard must be had to the condition in life and circumstances of the parties. (*Whitney v. Edgar, supra.*) The respondents are the master and mate of a sailing vessel, and have nothing so

Opinion of the Court—Deady, J.[April,

far as appears, beyond their earnings. The libellant is a seaman and a sailmaker, a native of Denmark, and under thirty years of age. On two discharges given him by a "superintendent of a mercantile marine office" at Hull, England, in 1869 and 1870, he is marked as an able-bodied seaman; "very good" as to character for "ability, capacity and conduct." The evidence shows that the bone of the upper arm was fractured, and that it has knit together, but not quite in place. The arm is yet weak, and unfits the libellant to do an able-bodied seaman's duty, but the physicians think it will be a pretty good arm in the course of a year. No expense or loss of time was incurred by libellant while on the brig, on account of the fracture. Allowing the libellant, if his arm was not injured, to be able to earn \$60 a month and find himself, I think it may be safely assumed that during the current year he will not be able, on account of the condition of his arm, to earn more than \$30 per month. This will be a loss to him of \$360. For the actual breaking of his arm, and the anguish, pain and suffering necessarily resulting from the fracture and the beating, and the subsequent heartless neglect with which libellant was treated by the respondents, it is not so easy to determine what sum should be allowed. In these respects, what are proper damages can only be estimated in a very general way, and much must depend in each case upon the condition in life and circumstances, pecuniary and otherwise, of the parties. After careful consideration, I have concluded to allow the libellant on these accounts, \$500. To these amounts something must be added by way of compensating the libellant for the expense which he has incurred in employing counsel, to maintain this suit to vindicate his rights. For this I will add \$200, making in the aggregate \$1,060 which the libellant is entitled to recover in any lawful money of the United States.

JACOB KAMM v. BENJAMIN STARK.

CIRCUIT COURT, DISTRICT OF OREGON,
APRIL 8, 1871.

1. **INJUNCTION TO STAY JUDGMENT.—NOTICE OF APPLICATION FOR NO STAY.**
Where a judgment is given in an action at law for the recovery of the possession of real property, and a bill in equity is filed by the defendant therein to stay proceedings, and notice given of an application for a provisional injunction to enjoin the enforcement of the judgment, the plaintiff in the judgment is in no way prohibited or restrained from enforcing the same, until an injunction is actually granted and served, or he has notice of the order allowing it.
2. **INJUNCTION NOT GRANTED AFTER EXECUTION.**—A provisional injunction will not be granted to restrain the plaintiff in an action at law from enforcing a judgment, where it appears that between the filing of the bill and the time of the application for the injunction, the judgment had been enforced by execution.
3. **INJUNCTION, WHEN NOT ALLOWED TILL AFTER FINAL HEARING.**—An injunction requiring a party to do a particular thing, as to surrender the possession of certain premises, is never allowed before final hearing.
4. **SUBPOENA, SERVICE OF UPON ATTORNEY.**—In case of a bill in equity to stay proceedings at law or a cross-bill, where the plaintiff in the action at law or original bill is beyond the jurisdiction of the Court, the Court will order the subpoena to appear to be served upon the attorney of such absent plaintiff; but when the judgment in such action at law has been enforced, the authority of the attorney to represent the absent party is at an end, and such order will not be made.

Before DEADY, District Judge.

This was a motion for a provisional injunction to stay proceedings at law, and for an order directing service of the subpoena in the suit upon the attorney of the defendant in the action at law, he being a non-resident of the State.

E. D. Shattuck, for motion.

DEADY, J. On February 14, 1871, Benjamin Stark obtained judgment in this Court in an action at law for the recovery of the possession of the south half of lot 3, in block 27, in the city of Portland.

On February 15, Kamm filed a bill in equity in this Court against Stark, setting forth certain facts and circumstances

Opinion of the Court—Deady, J.

[April,

from which he claimed that in equity he was entitled to the premises, and praying that Stark might be compelled to release his claim to the premises, and that in the meantime an injunction might be allowed to restrain Stark from enforcing the judgment for the recovery of the possession. On the same day that the bill was filed, notice was given to the attorney of Stark in the action at law, that on March 8, application would be made to one of the judges of this Court for the provisional injunction prayed for in this bill; and also that a motion would then and there be made for an order to serve the subpoena in this suit upon W. W. Page, the attorney of Stark in the action at law.

On March 8 and 9, the matter was heard at chambers, when it appeared from the affidavit of Kamm that Stark was a non-resident of the district, and could not be found therein, and that W. W. Page, Esq., was his attorney in the action at law.

Stark's attorneys (Messrs. Page & Hill) were present but declined to appear, suggesting that it appeared from the records of the Court, to wit: the *præcipe* and execution, in *Stark v. Kamm*, that the judgment had been enforced, and that therefore they were no longer the attorneys of Stark in that matter. Upon inspection of these papers it appeared that a writ of possession issued to enforce the judgment in question in pursuance of a *præcipe* filed by Stark's attorneys on February 27, and that in obedience thereto the marshal of the district, on the same day, dispossessed Kamm and put Stark into possession by delivering the same to his attorneys.

Counsel for Kamm in reply to the suggestion that after Stark had been put into possession upon the execution, it was too late to enjoin the enforcement of the judgment, insisted, that from the time of service of notice of the motion for injunction until the hearing thereof, Stark's right to enforce his judgment by reason of such service, was in some way suspended, and that consequently the issue and execution of the writ of possession were done in disregard of the authority of this Court and fraud of Kamm's rights, and should be treated as nullities.

In support of this extraordinary proposition counsel cited no authority except Barb. Ch. Prac. 634, which lays down the rule that although a party has not been regularly served with an injunction, he is liable for a breach of it, if in fact he had notice of its being granted.

But this is an application for an injunction, and not to punish the defendant for a breach of one after knowledge that it was granted, and before service of it. And if this were otherwise, certainly the authority is not in point, unless it be further shown that notice of an intention to apply for an injunction is equivalent in law to the granting of it—at least until the application is denied. If such were the doctrine in regard to the effect of an application for an injunction, the granting of provisional injunctions to restrain a defendant until the final hearing could never have been necessary. Upon the filing of a proper bill with a prayer for a perpetual injunction and service of a subpoena, there would be an application for an injunction certainly entitled to as much consideration and effect as a mere motion for a temporary one.

The fact is, the plaintiff is too late to enjoin Stark from enforcing his judgment for possession. It is already enforced, and it is now physically impossible to prevent it. Nor can a provisional injunction now issue to restore the possession of the property to Kamm. An injunction is never granted, requiring a party to do a particular thing until after final hearing and decree. Stark has the legal title to this property, and lawful possession under the judgment and process of this Court. If Kamm wished to have the proceedings at law enjoined so as to enable him to retain the possession until the determination of a suit in equity to establish his title, he should have commenced in time, and not delayed until Stark had judgment and possession under it. True, notice had to be given of the motion for injunction, but that notice might have been shortened upon application to the judge to one day, or even less time if necessary. Besides, ten days elapsed after judgment, before the notice was given, and moreover, as Kamm had no defense to the action at law, he should have filed his bill and asked

for an injunction, as soon as the action for the possession was commenced against him. The special injunction applied for must be denied.

The motion for substituted service of the subpoena will next be considered. In the English Chancery, in case of a bill to stay proceedings at law, and in case of a cross-bill, if the plaintiff at law or in the original bill was “abroad”—beyond seas—the practice was upon motion of the complainant to order service of the subpoena to be made upon the attorney for his absent client. (Smith’s Chan. 116, 605.) The same practice *ex necessitate rei* prevails in the United States Courts, when the plaintiff in the action at law or the original bill is a non-resident of the State where the Court is held, and cannot be served personally therein. (Conk. Trea. 143.)

The motion may be and usually is made *ex parte* (Smith’s Chan. supra), and regularly the subpoena should be taken out before it is made. In the United States Courts, notice of an application for an injunction is required by statute to be given in all cases. On this account it would seem necessary, when service of the subpoena is made upon the attorney to serve it before the application for an injunction can be made, because until the service of the subpoena, or at least the allowance of the order for serving it, there is no one within the jurisdiction of the Court to whom notice of such application can be given.

The subject of the controversy must be the same in the action at law and the suit in equity, because the Court cannot presume the attorney who represents a party in one cause to be his representative in another, except for the identity of the subject of the litigation. (*Hitner v. Suckley*, 4 Wash. C. C. 465.) Assuming for the present, that the subject of the controversy in this suit and the action at law are identical, the only question to be considered upon this application, is, whether or not the relation of attorney and client still subsists between the defendant Stark and Mr. Page? It is shown that it did exist in the action at law. Upon the facts, is such relation presumed to continue after judgment, and if so, how long and for what purpose.

1871.]

Opinion of the Court—Deady, J.

Under the Code, the authority of an attorney in an action continues, unless there be a change, during the pendency thereof and for three years after judgment for the purpose of receiving payment and acknowledging satisfaction of the same. (Or. Code, 400.) At common law the authority of an attorney continued “until judgment and for a year and a day afterwards, to sue out execution, and for a longer term, if the execution be continued.” (1 Atty. Prac., K. B. 67.) An attorney’s authority determines with the judgment, or at least with the issuing of the execution within the year. (*Jackson v. Bartlett*, 8 John. 367.) His power after judgment extends only to the issuing of execution, and receiving the debt. (Ch. J. Kent, in *Kellogg v. Gilbert*, 10 John. 221.)

From these authorities and others that might be cited, it seems not to admit of question, that an attorney’s authority ceases with the obtaining of judgment, except for the purpose of issuing execution and acknowledging satisfaction, and that whenever the judgment is enforced or satisfied by execution or otherwise, it ceases absolutely.

In this case the execution was issued, executed and returned before the application for the order to serve the subpoena on Mr. Page, was made. But Page’s authority as an attorney in the action at law being then at an end, as to that he was no longer the attorney of the party. True, it may or may not be, that Mr. Page is Stark’s attorney in other matters, or even upon a general retainer. That matters not so far as this motion is concerned. To authorize an order permitting service of the subpoena to be made upon Page for Stark, and thereby give this Court jurisdiction over the person of the latter, it must appear that Page is now in fact the attorney of Stark in an action at law, in which the complainant now seeks and may be entitled to enjoin further proceedings.

Now, the fact is, there is no action at law pending between these parties concerning this property. There was once, but Kamm took no steps to enjoin the proceedings therein, until the action had ripened into a judgment, and that had been enforced. For this reason, there is no longer

Opinion of the Court—Deady, J.

[April,

an attorney of the plaintiff in that action upon whom to serve the subpoena in that suit, so as to enable the plaintiff herein to maintain the same, and enjoin the proceedings in such action, nor would it be of any avail to the complainant in this respect, if there was such an attorney, or if he had service on Stark in person, because the latter having prosecuted his action to judgment, and obtained possession of the property by execution thereon, there are no further proceedings which can be had therein, and consequently there is nothing to enjoin.

In what has been said, it is of course assumed that an attorney cannot be deemed the representative of an absent party, so as to be considered capable of receiving service of the subpoena for him, only so long and so far as authority as attorney for such party exists and extends, Mr. Page's authority as attorney for Stark in the action of *Stark v. Kamm* having necessarily ceased with the termination of the proceeding—the enforcement of the judgment therein—he is no longer his representative touching the subject matter of that action.

Upon the question as to whether Mr. Page is still attorney for Stark, counsel for Kamm made the point, that Stark's judgment at law was not presumed to be yet satisfied, because it did not appear that the plaintiff's costs and expenses in the action had been paid or collected. The entry of judgment was not read on the hearing, but in the absence of anything to the contrary, I suppose it is proper to suppose that the judgment was given for costs and expenses, as well as possession of the property. The *præcipe* directs the execution to issue to put Stark in possession in accordance with the judgment. Nothing is said in it about costs. The execution contains no clause concerning the costs and expenses. If there was a judgment for costs and expenses, and it was intended to enforce it, a clause to that effect, should have been inserted in the execution. The writ was executed by putting Stark into possession, and returned on February 28. Under this state of facts, I think it reasonable to conclude that if there was any judgment for costs, it must be considered satisfied.

1871.]

Syllabus.

But admitting that there was a judgment for costs and expenses, which remains unsatisfied, and that, therefore, Page is still Stark's attorney, in respect to the judgment he would only be so, so far as it remains unsatisfied. As to the title and possession of the property which is the subject of this suit, the judgment is satisfied. They are no longer in litigation in the action at law, and Page is not, therefore, Stark's attorney in respect to them. The subject matter of this suit is not the costs and expenses of the action at law, but the title and possession of the real property, and as to these, there is no judgment pending between the parties.

Motion denied at cost of complainant.

GEORGE B. BISSELL v. J. M. HENSHAW, *et al.*

CIRCUIT COURT, DISTRICT OF CALIFORNIA,
APRIL 12, 1871.

1. **STATUTE LIMITATION.**—Section 7, of the Statute of Limitations of California, as amended in 1855, has no application to actions for the recovery of land. Section 6 is the only one applicable to such actions.
2. **LIMITATION, MEXICAN GRANTS.**—Under the proviso to section 6, a party claiming title under a Mexican grant, can commence his action to recover the land at any time within five years after the final confirmation of the grant.
3. **IDEM.**—The said proviso to section 6, refers to plaintiff's, not the defendant's, title.
4. **LIMITATION ACT OF 1863.**—The provisions of section 6, of the Statute of Limitations of 1863, are, substantially, the same on this point as section 6 of the Act of 1855.
5. **WHAT FINAL CONFIRMATION.**—The issuing of the patent is the final confirmation within the meaning of the Statute of 1855, in all cases where the survey is not confirmed by the District Court, in pursuance of the Act of Congress of June 14, 1860; but, in those cases wherein the survey is confirmed under the provisions of said Act of Congress, the date of final confirmation is the date when the decree of the Court approving the location becomes final.
6. **IDEM.**—These definitions of final confirmation were adopted in express terms in section 7 of the Statute of Limitations of 1863.

Syllabus.

[April,

7. JURISDICTION, GENERAL LAND OFFICE.—The Commissioner of the General Land Office has jurisdiction to revise or set aside a survey of a Mexican grant, made by the United States Surveyor-General for the State of California, under the Act of Congress of March 3, 1851.
8. SURVEY BOGA GRANT, JURISDICTION DISTRICT COURT.—The survey of the Boga grant having been made and approved by the United States Surveyor-General for California, and returned into the District Court prior to June 14, 1860, and the said survey being on that day pending in said Court, for the purpose of contesting or reforming the same, it is one of the cases made subject to the provisions of the Act of Congress of June 14, 1860, relating to the subject, and the District Court had jurisdiction to revise said location.
9. JURISDICTION, FINAL LOCATION.—But, conceding that the District Court had not jurisdiction, then the issuing of the patent is the final location, and the Statute of Limitations did not begin to run till the date of the patent, October 5, 1865. In either case the action was commenced in time.
10. ESTOPPEL BY MATTER IN PARS.—The Government having finally located the Boga grant, so as to include the lands in question, against the protest of the claimant, Larkin, the former selection by said Larkin of other lands, and disclaimer as to these, do not now estop him or those in privity with him, from setting up the title derived under their patent, as against the claimants under the subsequent grant to Fernandez, located on the same land after said selection and disclaimer, and before the final location of the Boga grant.
11. PROCEEDINGS UNDER ACT 1860, JUDICIAL.—Proceedings to confirm surveys of Mexican grants by the United States District Court under the Act of Congress of June 14, 1860, are judicial in their nature; and the judgments therein are conclusive upon all parties thereto, and those who are required to make themselves parties.
12. *IDEM*.—IN REM, WHO MUST COME IN.—The proceedings under said Act of June 14, 1860, are in the nature of proceedings *in rem*, and all parties claiming any interest must intervene for the protection of such interest, or be concluded.
13. TWO GRANTS LOCATED ON SAME LAND.—There were two Mexican grants of land within the same exterior boundaries, one for five leagues, made February 21, 1844, and the other for four leagues, made June 12, 1846. The former was presented to the Board of Land Commissioners for confirmation March 24, and the latter, March 19, 1852. The decree of confirmation became final in the former, February 9, and in the latter, March 2, 1857. The location of the junior grant was made by the Surveyor-General, and approved by the Commissioner of the General Land Office, and became final by the issuing of the patent, October 14, 1857. The elder grant was located by the District Court under the provisions of the Act of Congress of June 14, 1860, and became final June 26, 1865, and the patent issued October 6, 1865. The two patents overlapped to the extent of one square league. *Held*: that the patentees under the elder grant, though it was the last finally located and patented, have the better title.

1871.]

Statement of Facts.

Before SAWYER, Circuit Judge.

This was an action to recover a league of land. It was tried by the Court without a jury. The following is a summary of the facts condensed from the findings filed by the Court:

The plaintiff claimed title under a Mexican grant of five leagues of land, made to Charles William Flugge, which was duly presented to the Board of Land Commissioners, finally confirmed and patented to Thomas O. Larkin.

The land granted is called the Boga Rancho.

The defendants also claimed title under a Mexican grant to Dionisio and Maximo Fernandez, of four leagues of land, the same being commonly called the Fernandez grant. This grant was also duly presented to the Board of Land Commissioners, confirmed and patented.

The patents overlap to the extent of one league—the north league of the Boga grant, the land patented to Larkin, being coincident with the south league of the land patented to Fernandez and others.

Both of the original grants call for a specific quantity of land within designated boundaries, and both diseños cover, in part, at least, the same general tract of land.

The plaintiff's grant for five square leagues bears date February 21, 1844, and purports to have been approved by the Departmental Assembly, June 13, 1845.

The defendant's grant for four leagues bears date June 12, 1846, and has no approval of the Departmental Assembly. The latter was presented to the Board of Land Commissioners March 19, and the former March 24, 1852.

Both grants was confirmed by the Board of Land Commissioners on the same day, July 17, 1855.

An appeal having been taken in the case of the Boga (plaintiff's) grant, it was dismissed, and the decree of the Board confirming said grant became final, February 9, 1857.

An appeal in the case of the Fernandez (defendant's) grant having also been taken, the decree of confirmation was affirmed by the District Court, March 2, 1857, which decree became final March 9, 1857.

Statement of Facts.

[April,

The survey of the Fernandez grant was approved by the United States Surveyor-General of California, May 29, 1857, which survey having been approved by the Commissioner of the General Land Office, became final, and the patent of the United States duly issued in accordance therewith, October 14, 1857.

The survey of the Boga (plaintiff's) grant having been afterward made and approved by the United States Surveyor-General, March 26, 1858, said survey was set aside by the Commissioner of the General Land Office as erroneous, and a new survey ordered.

A second survey having been made and approved by the United States Surveyor-General, October 4, 1859, the United States contested said survey, and on application of the United States District Attorney, made on the same day, the District Court of the United States for the Northern District of California, directed the said Surveyor-General to return said survey into said Court, and said survey having been returned into Court, in pursuance of said order, such proceedings were subsequently therein had, under the Act of Congress June 14, 1860, that a survey of said grant was approved by said District Court, January 15, 1863, which said survey became final by dismissal of the appeal, June 26, 1865, and afterwards, a patent of the United States issued in accordance with said final survey, October 5, 1865.

Thus it will be seen, that the plaintiff claims under the elder grant; that the junior grant of defendants was first presented to the Land Commission; that the decree of confirmation of the elder grant first became final, and that the survey of the junior grant was first made, and first became final, and the patent in accordance therewith first issued, the defendants' grant being thereby first finally and definitely located and segregated.

The plaintiff's grant had been twice located by the Surveyor-General after confirmation, and, also, preliminarily, before confirmation, so as not to interfere with the final location of the defendants' grant, with all of which locations the claimants thereunder were satisfied; but said locations were changed, on the motion of the United States

1871.]

Statement of Facts.

against their opposition, and finally located against the wishes and opposition of the claimants, so as to include the south league of the land already covered by defendants' location and patent.

Flugge, in his petition, asked for a tract of land "situate on the western side of Feather River, and stretching along the said river from 39 degrees 33 minutes 45 seconds north latitude, to 39 degrees 48 minutes 45 seconds, and forming on this line a square one league in breadth. It is called Boga, as it is rendered manifest by the annexed sketch."

The diseño annexed to the petition, which is an unusually accurate one of the territory embraced in it, lays down the line of latitude, as intended for the first parallel mentioned, and the surrounding country, as it stands related to the parallel. The grant was made in accordance with the petition, making the first named parallel, as located, the "first boundary." It turned out that the line, as laid down on the diseño, is not the true location of the parallel of latitude 39 degrees 33 minutes 45 seconds—the true location of that parallel being several leagues to the northward of the line, as located on the diseño. There could be no difficulty in locating the grant, after ascertaining the southern boundary, for it was to stretch along the western side of Feather River, five leagues in length, by one league in breadth.

Larkin claimed, and the Surveyor-General, who first located the Boga grant, supposed, that the true location of the parallel, 39 degrees 33 minutes 45 seconds, must be taken as the southern boundary, and the grant was first located in conformity with that view.

This view, however, evidently located the grant entirely beyond the limits indicated on the diseño, and was erroneous. (*United States v. Sutter*, 21 How. 176; *United States v. Sutter*, 2 Wallace, 585.) But it was so first located.

The Fernandez grant had been already located to the southward, and in part, at least, within the diseño of the Boga grant. The Commissioner of the General Land Office, and afterwards the District Court, held that the parallel of latitude, as laid down on the diseño of the Boga grant, with reference to other unmistakable natural objects

Opinion of the Court—Sawyer, J.[April,

must control, rather than the true location of the parallel as designated by the number of the degree. But before the decision, the Fernandez grant had been finally located and patented, and the Boga grant was subsequently located by the decree of the District Court, mostly to the southward of the Fernandez location, but overlapping it on its southern part to the extent of one league. The second survey of the Boga grant, made under the instructions of the Commissioner of the General Land Office, approved by the Surveyor-General, October 4, 1859, and which was ordered to be returned into the District Court, was located entirely to the southward of the location of the Fernandez grant, and included none of the land covered by the latter, as finally located. The monition mentioned in the findings issued after the return of said survey into the District Court, and default was entered against those failing to appear, before said survey was modified as finally approved.

The claimants under the Fernandez grant did not appear in answer to said monition in any of said proceedings in the District Court.

Wm. H. Patterson and Chas. H. Sawyer, for plaintiff.

R. Aug. Thompson and P. Ord, for defendants.

SAWYER, Circuit Judge. The question is, which grant takes the land? Some questions raised by counsel, not wholly depending upon the several grants and patents, will be first considered; and firstly, it is insisted that the action is barred by the Statute of Limitations.

If I understand the argument of counsel, it is claimed that section 7, and not section 6, of the Statute of Limitations, as amended in 1855 (Stat. 1855, 109, sec. 1 and 2); before its repeal, applied to the case; that section 6, of the Act of 1863, carries out the same idea in its second proviso (Stat. 1863, 327, sec. 6); and that the statute commenced to run from the time of the final confirmation of the defendants' grant, they having been in adverse possession under their grant from the year 1852.

In this view, I am satisfied, counsel are in error. It is

1871.]

Opinion of the Court—Sawyer, J.

settled by the Supreme Court of California, that section 7 of the Statute of Limitations, as it existed prior to the amendment of 1863, had no application whatever to actions for the recovery of lands; and that section 6 was the only section applicable to such actions. (*Richardson v. Williamson*, 24 Cal. 299; *Hibbard and Piper v. Smith et al.*, manuscript.)

Under section 6, a party claiming title derived from the Spanish or Mexican Government, can maintain his action, if commenced at any time within five years after the final confirmation of his grant by the Government of the United States. (*Id.*; also *Davis v. Davis*, 26 Cal. 46; *Reed v. Spicer*, 27 Cal. 58.)

The proviso to the 6th section refers to the plaintiff's title, and says nothing about the defendant's title. Under this provision it matters not how long the defendants may have been in possession, or under what character or title they claim, if the plaintiff commences his action within the time prescribed after a final confirmation of his own title. And there is nothing in section 6, of the Act of 1863, to change the aspect of the question.

The second proviso in that section covers the ground of the provisos of both sections 6 and 7 of the Statute of Limitations, as they before existed. (Stat. 1863, 327, sec. 6.) The proviso is as follows:

“Provided, further, that any person claiming real property, or the possession thereof, or any right or interest therein, under title derived from the Spanish or Mexican Governments, or the authorities thereof, which shall not have been finally confirmed by the Government of the United States, or its legally constituted authorities, more than five years before the passage of this Act, may have five years after the passage of this Act in which to commence his action for the recovery of such real property, or the possession thereof, or any right or interest therein, or for rents or profits out of the same, or to make his defense to an action founded upon the title thereto; and provided, further, that nothing in this Act contained shall be so construed as to extend or enlarge the time for commencing

Opinion of the Court—Sawyer, J.

[April,

actions for the recovery of real estate, or the possession thereof, under title derived from the Spanish or Mexican Governments, in a case where final confirmation has already been had, other than is now allowed under the Act to which this Act is amendatory.”

It is settled by the Supreme Court of California that final confirmation, as used in the statute as amended in 1855, in cases where the survey is not confirmed by the District Court, under the Act of 1860, is the issuing of the patent, and that the statute commences to run only from the date of the patent. (*Johnson v. Van Dyke*, 20 Cal. 229; *Davis v. Davis*, 26 Cal. 46; *Reed v. Spicer*, 27 Cal. 58; *Beach v. Gabriel*, 29 Cal. 584.)

But where the survey was finally confirmed by the Courts, under the Act of Congress of June 14, 1860, the final confirmation was held to be the date when the decree of the Court approving the location became final. (*Mahony v. Van Winkle*, 33 Cal. 457; *Hibbard and Piper v. Smith et al.*, manuscript.)

Section 7 of the Act of 1863, adopted by express provision these definitions, thus laid down by the Court, of the term “final confirmation,” as used in the statute. It provides, that final confirmation shall be deemed the patent, or the final determination of the official survey under the Act of Congress of June 14, 1860.

In this case, the decree of the District Court confirming the location of the Boga Rancho became final, June 26, 1865, and the patent issued October 5, 1865.

Supposing either of these dates to be the date of their final confirmation, there was no final confirmation of the survey of the Boga grant, until long after the passage of the Act amending the Statute of Limitations in 1863; and, at the date of the passage of that Act, the statute had not begun to run. If the District Court had jurisdiction of the survey, the first would be the date of final confirmation, otherwise, the second.

The plaintiff, under the proviso of that act, consequently, had either five years from the passage of the act (April 18, 1863), as some maintain, or five years from final confirma-

1871.]

Opinion of the Court—Sawyer, J.

tion—that is to say, either from June 26, or October 5, 1865, within which to commence his action. The action was commenced on the fifteenth of May, 1867, within the time, whichever of these dates is assumed as the correct one, from which the statute began to run.

It is, also, insisted by defendants' counsel, that under the Act of Congress of 1851, creating the Board of Land Commissioners, the Surveyor-General was the party authorized to locate the land; that the Commissioner of the General Land Office had no authority to revise or control the location so made by the Surveyor-General; that the location of the Boga grant, approved by J. W. Mandeville, March 26, 1858, was final; that the subsequent setting aside of said location by the Commissioner of the General Land Office, and all subsequent locations, and proceedings by the Surveyor-General and District Court are void for want of jurisdiction; and that the Statute of Limitations began to run from said March 26, 1858.

But it is sufficient to say that, in *Castro v. Hendricks* (23 How. 440–43), the Supreme Court of the United States held otherwise—a case in which the point is directly involved, and decided.

This case is not overruled in *United States v. Sepulveda* (1 Wal. 104), as counsel claim, but on the contrary it is affirmed on this point, for it is expressly stated by the Court that the Commissioner of the General Land Office is invested with a “supervision over the acts of all subordinate officers charged with making surveys.” (1 Wal. 107.) And again, in the same case: “If the survey does not conform to the decree of the Board, the remedy must be sought from the Commissioner of the General Land Office before the patent issues.” (Id. 109.)

I know of no subsequent case which calls this view in question. It is, therefore, conclusive on this Court, whether right or wrong, but I think it clearly right.

It is also insisted that the District Court had no jurisdiction to order the cause into Court, or to take any of the subsequent proceedings had in that Court, which resulted in the survey, as finally approved by that tribunal, and in

Opinion of the Court—Sawyer, J.[April,

the patent issued in accordance with said approved survey. The survey was, doubtless, ordered to be returned into the District Court, upon the supposition that the jurisdiction of the Court over such matters had been determined by the Supreme Court, in the case of the *United States v. Fossatt*, (21 How. 445), and the approval of this decision in *Castro v. Hendricks* (23 How. 442).

As the decree from the appeal of the Board of Land Commissioners had been dismissed, and the case was no longer pending in the District Court, at the time the plat and survey was ordered to be returned into Court, it would seem, from the case of the *United States v. Sepulveda* (1 Wal. 106), that the matter was not, at the time the order was originally made, within the jurisdiction of that Court. But the order had, in fact, been made, and the plat had been returned into the District Court, and the proceeding to rectify the survey was actually pending in that Court, June 14, 1860, when the Act of Congress of that date entitled "An act to amend an act to define and regulate the jurisdiction of the District Courts of the United States in California, in regard to the survey and location of confirmed private land claims," was passed, and took effect.

Section 6 of said act provides as follows:

"And be it further enacted, that all surveys and locations heretofore made and approved by the Surveyor-General of California, which have been returned into the said District Courts, or either of them, or in which proceedings are now pending for the purpose of contesting, or reforming the same, are hereby made subject to the provisions of this act, except that in the cases so returned or pending, no publication shall be necessary on the part of the Attorney-General." (12 Stat. at L. 34, sec. 6.)

This case comes within the express provisions of that section. It was a case in which the survey had been "made and approved by the Surveyor-General of California," and it had "been returned into the District Court," and proceedings were then "pending for the purpose of contesting, or reforming, the same," and it is, therefore, one of the cases "made subject to the provisions of this act." It is

1871.]

Opinion of the Court—Sawyer, J.

one of the exceptions referred to by the Court in *United States v. Sepulveda* (1 Wal. 106).

Jurisdiction to proceed was given by the act, and the subsequent proceedings were in accordance with its provisions. It was so held by the Supreme Court in a similar case. (*United States v. Halleck*, 1 Wal. 453.)

But even if it were not so, the survey had not been submitted to the Commissioner of the General Land Office, and had not received his approval, and the survey and plat finally approved by the District Court, was approved and duly authenticated by the Surveyor-General, transmitted by him to the Commissioner of the General Land Office, and by him acted upon as correct, and adopted, and the patent issued in accordance therewith, this being the only survey and plat ever approved by that officer.

Therefore, aside from the action of the District Court, the survey did not become final till the patent issued, within the meaning of the Statute of Limitations, as settled by the Supreme Court of California, and the construction of that Court of a statute of California, is conclusive upon this Court. Whether the action of the District Court was efficacious or not, the survey approved by the Court was adopted by the Commissioner of the General Land Office, and became final by his action, if it was not so before.

The plaintiff is not estopped by the acts of Larkin in making his selection and claiming his land where it was first located, or any other of his acts connected with that location.

The land was located twice, besides the preliminary location, by the Surveyor-General, without interfering with the location of the Fernandez grant, either of which locations he would have accepted, and he each time opposed the change, but it was finally located by the District Court, upon a contest by the Government, and against the claimants' opposition, as it was patented, and so as to conflict with the prior location of the Fernandez grant.

There is nothing in this case upon the question of estoppel, to take it out of the rule as indicated in *Moore v. Wilkinson*, 13 Cal. 488; *Biddle Boggs v. The Merced Mining Co.*, 14 Cal. 279, and *Davis v. Davis*, 26 Cal. 40.

We come now to the great and highly important, as well as interesting, question in the case—a question likely to arise in other cases, involving large amounts of property, to wit: which grant, under the facts of the case, carries the title to the land covered by both patents?—the elder grant, last presented to the Board of Land Commissioners for confirmation, and last located and patented, though first confirmed, or the junior grant, first presented for confirmation, and first finally located and patented?

Although there are many decisions bearing more or less directly upon the question, this is the first time, so far as I am aware, that this precise question has been presented for determination in an action of ejectment between two conflicting patents, issued upon confirmed Mexican grants, in the national Courts. Under the authorities, as they now stand, the question is one of great embarrassment and difficulty. Indeed, I find it no very easy task to reconcile all the views expressed in different cases, having reference to different states of facts bearing upon the question. The claimant, under one or the other of these grants, must lose a league of land, and although it is not easy to determine which has the better right, yet I think principles may be extracted from the cases, which should control the action of this Court.

On the part of the defendants, it is insisted that where a grant was made by the Mexican Government of a definite quantity of land, without specific boundaries, within a larger area, the right of location remained with the Government; that the Government was not precluded from making a subsequent grant, with specific boundaries, within the larger area; that such subsequent grant with specific boundaries would take precedence of a prior unlocated grant; that when one of two grants of a specific quantity within a larger area has been located by the Government, the grant becomes specific and attaches to the land; that, upon the cession of California to the United States, the right of location of such general grants passed to the United States, and is to be executed according to the laws of the United States; that the grant first located, even if the junior

1871.]

Opinion of the Court—Sawyer, J.

grant, becomes specific by the location, and the title to that specific tract of land vests absolutely in the grantee; that the patent takes effect by relation from the filing of the petition for confirmation with the Board of Land Commissioners; that the grants in question are grants of that kind; that the defendants, having first filed their petition, and secured the first final location, their grant became specific, and attached to the land embraced in their patent, and having the elder patent, taking effect by relation, from the filing of the petition, it is conclusive; and that the plaintiffs are not "third persons" within the meaning of the fifteenth section of the Act of Congress, of March 3, 1851, and are therefore not in a position to dispute their title. The case of *Waterman v. Smith* (13 Cal. 407), and the cases therein cited from the United States Supreme Court Reports, of which Fremont's case (17 How. 558) is one, are relied on as sustaining their view.

On the part of the plaintiff, it is argued that a different rule, or at least a modification of the rule, was laid down by the same Court, in the subsequent cases of *Leese v. Clark* (18 Cal. 537, and 20 Cal. 387), and *Teschmacher v. Thompson* (18 Cal. 26); and that under the rule, as thus established, the elder patent in this case takes the land; and, it is claimed, also, that this view is sustained by the cases of *Beard v. Federy*, 3 Wal. 479; *Rodriguez v. The United States*, 1 Wal. 582; and the cases of *Treadway v. Semple*, 28 Cal. 652, and *Semple v. Wright*, 32 Cal. 659, decided upon the authority of Rodriguez's case.

In *Leese v. Clark* the Court held that a patent issued upon a confirmed Mexican grant is to be regarded in two aspects:

"Firstly—As a deed of the United States.

"Secondly—As a record of the Government, showing its action and judgment with respect to the title of the patentees at the date of the cession."

The Court say: "As to the operation and effect of the patent, there can be no question. It is the last act of a series of proceedings taken for the recognition and confirmation of the claim of the patentees to the land it embraces,

Opinion of the Court—Sawyer, J.

[April,

the first of which was the petition to the Board of Land Commissioners. With respect to such proceedings, it takes effect by relation at the date of the first act. As the deed of the United States, it is to be regarded as if it had been executed at that time. It passes whatever interest the United States may then have possessed in the premises. (18 Cal. 570-1.) And again: Treated as the simple deed of the United States, we admit that the operation of the patent is only that of a quitclaim deed, or rather of a conveyance of such interest as the United States possessed, the deed taking effect by relation at the date of the presentation of the petition of the patentees to the Board of Land Commissioners. (20 Cal. 421.)

“But the patent is not merely a deed of the United States; it is a record of the Government; of its action and judgment with respect to the title of the patentee, existing at the date of the cession.

“Again, the patent is the evidence which the Government furnishes the claimant, of its action respecting his title. Before it is given, numerous proceedings are required to be taken before the tribunals and officers of the Government; and it is the last act in the series, and follows as the result of those previously taken. It is, therefore, record evidence of the Government’s action. By it, the Government, representing the sovereign and supreme power of the nation, discharges its political obligations under the treaty and law of nations. By it, as we have said in the case already cited, the sovereign power which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid, and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty; and that the grant was located, or might have been located, by the former Government, and is correctly located by the new Government, so as to embrace the premises, as they are surveyed and described.” (20 Cal. 423, and 18 Cal. 26.)

In the latter aspect, then, as a record of the Government, according to the view thus expressed, the patent is evidence, not only of the grant, but also, that the land has been “correctly located”—that is to say, that it conveys the very land

1871.]

Opinion of the Court—Sawyer, J.

originally intended to be granted, and it necessarily relates to the date of the original grant.

In *Teschmacher v. Thompson* (18 Cal. 26), the same Court says: "The patent, it is true, as a deed of the United States, takes effect only from the date of the presentation of the petition of the patentees to the Board of Land Commissioners. ***** But as the record of the Government, of the evidence and validity of the grant, it establishes the title of the patentees from the date of the grant," etc.

And in *Stark v. Barrett* (15 Cal. 366):

"In addition to this being conclusive upon the question of the existence and validity of the grant, it [the patent] necessarily establishes the title of the patentees from the date of the grant."

The character and effect of the patent, as thus stated, in *Leese v. Clark*, has also been adopted, and the principle stated, in language almost precisely the same, by the Supreme Court of the United States, in the case of *Beard v. Federy* (3 Wallace, 491-2). The Court in that case, says:

"In the first place, the patent is a deed of the United States. As a deed, its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the Board of Land Commissioners.

"In the second place, the patent is a record of the action of the Government upon the title of the claimant, as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them, to the same extent as under the former Government. The treaty of cession, also, stipulated for such protection.

"The obligation to which the United States thus succeeded was, of course, political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the act of March 3, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a

Opinion of the Court—Sawyer, J.[April,

special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the Government; authorized appeals from the decisions of the tribunal, first to the District and then to the Supreme Court; and designated officers to survey and measure off the land when the validity of the claim is finally determined. When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the Government acts and issues its patent to the claimant. The instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it, the Government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former Government, and is correctly located now, so as to embrace the premises, as they are surveyed and described. As against the Government, this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the Government by title subsequent. *It is in this effect of the patent as a record of the Government, that its security and protection chiefly lie.* If parties asserting interests in lands acquired since the acquisition of the country, could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor."

Upon the provision of the fifteenth section of the Act of 1851, providing that the decrees of the Courts, or patent issued under the act, "shall be conclusive between the United States and said claimants, only, and shall not affect the interest of third persons;" the Court in *Beard v. Federy*, further observes, that "the third persons," as there used, does not embrace all persons other than the United States, and the claimants, but only those who hold superior titles,

1871.]

Opinion of the Court—Sawyer, J.

such as will enable them to resist successfully any action of the Government in disposing of the property.

This, also, is but adopting the language of the Supreme Court of California in *Waterman v. Smith*, 13 Cal. 420; *Moore v. Wilkinson*, 13 Cal. Id. 488; *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 362, and other cases.

In *Waterman v. Smith*, the Court say: "The third persons * * * are those whose title is, at the time, such as to enable them to resist successfully any action of the Government in respect to it. Parties holding claims which may be located without the boundaries of the patent, and still within the limits of the general tract designated in the grants to them, do not constitute third persons." (13 Cal. 420.) And, again, in *Teschmacher v. Thompson* (18 Cal. 27), the Court say that the "third persons" referred to "are those whose title accrued before the duty of the Government and its rights under the treaty attached." Again, they "are those whose title to the premises patented not only accrued before the duty of the Government and its rights under the treaty attached, but whose title to such premises was, at that date (the date when the duty of the Government attached, or date of the treaty), such as to enable them to successfully resist any subsequent action of the Government affecting it." (*Leese v. Clark*, 18 Cal. 572.) And this is repeated in the same case, on a subsequent appeal (20 Cal. 412-13).

And the Court further say, in *Leese v. Clark*: "Unless the Government interferes in the matter, the defendants, as junior grantees, are remediless. Their title to the premises was not such, at the date of the treaty, as to enable them to resist the action of the Government in the location of the elder grant. They are not, therefore, 'third persons,' within the meaning of the fifteenth section of the Act of Congress." (18 Cal. 575.)

The opinion in *Beard v. Federy* (3 Wal.), was delivered by the same learned judge, who, as Chief Justice of the Supreme Court of California, delivered the opinion from which the foregoing quotations are made; and the language of that opinion was, doubtless, intended to embody the

Opinion of the Court—Sawyer, J.

[April,

same idea in the definition of "third persons" therein adopted. According to this comprehensive definition of the learned judge, and the Court for which he speaks, as understood and maintained by the defendant, then, no one is a "third person," within the meaning of the said Act of Congress, except a party who not only holds a Spanish or Mexican grant, but, also, whose grant or title was such at the date of the treaty that he could successfully resist any action of the Government in regard to its location, or in any way affecting it. That is to say, no one who, at the date of the treaty, did not have a complete, and in every particular perfect, title to a specific, finally segregated and located a tract of land, with all the formalities, including the act of juridical possession, is a "third person," as that term is used in the Act of Congress, or, in other words, has a *status* that will enable him to question the conclusiveness, either as to the validity of the grant, or the correct location of the land, of a patent issued upon a confirmed Mexican grant. No party having an inchoate Mexican grant, at the date of the treaty, is a "third person," or has such *status*; and every such patent is conclusive upon every party whose title was inchoate at the date of the treaty.

The defendants invoke this doctrine, and say that the plaintiff's grant was inchoate; that the plaintiff could not successfully resist the action of the Government in respect to his grant, or its location, at the date of the treaty; and that the plaintiff, not being a "third person," the defendants' patent being the elder patent, founded upon a grant first located, though issued to perfect a junior grant, is conclusive.

But under this same rule, thus broadly stated, the plaintiff, with equal force, says that the defendants' grant was inchoate; that defendants' title was not such at the date of the treaty as to enable them to resist the action of the Government, affecting plaintiff's elder grant, or its location; and, therefore, that defendants are not "third persons," with reference to his patent, within the assumed definition of that term; and that plaintiff's patent, issued upon a confirmed elder grant, is conclusive upon defendants for that reason.

1871.]

Opinion of the Court—Sawyer, J.

Both patents were issued upon grants which were inchoate at the date of the treaty, but nevertheless, both patents cannot be conclusive upon the claimants under the conflicting patents. Both cannot take the land.

It seems evident, therefore, that the problem involved in this controversy must be solved upon some other principle than the doctrine, alone, of "third persons," as thus broadly laid down in the decisions referred to, and as thus understood.

But it is evident that this comprehensive definition of "third persons" was given with reference to the facts of the cases then under consideration, which were actions in which but one of the parties claimed under a patent issued upon a confirmed Mexican grant, and the other set up against the patent, either an unconfirmed and unlocated, or an unlocated confirmed grant, or a claim under the pre-emption laws of the United States, or under some State law alone, or a State law in conjunction with some Act of Congress, by which some right was claimed to have attached in favor of the party since the date of the treaty with Mexico.

I find no case wherein the question is considered between parties claiming under different patents, issued upon different confirmed Mexican grants, finally located upon the same land; and it, doubtless, never occurred to the Court, when considering the question, that such a case would arise. With reference to such a case, it would seem that the construction on this point of the fifteenth section requires some limitation, and a limitation is clearly and expressly recognized in the case of *Rodriguez v. United States* (1 Wallace, 582), which will be more particularly referred to in a subsequent part of this opinion, and by implication, at least, in other cases.

But to return to the cases of *Waterman v. Smith*, and *Leese v. Clark*, and the different rules supposed to be adopted in other particulars, in these cases, and other cases of a similar character, invoked by the respective parties.

It will be observed that, in none of those cases, did the question arise between two patents founded upon confirmed Mexican grants, located by the tribunals, or officers of the United States Government, upon the same land.

Opinion of the Court—Sawyer, J.[April,

In *Waterman v. Smith*, the contest was between the patentee of a confirmed and located grant on one side, and the holder of an unlocated grant, on the other. One of the grants was for four leagues within a tract of eight or nine leagues, and the other for three leagues, within an area containing twenty leagues. (13 Cal. 383.)

No one line in either was fixed, from which the measurement must necessarily commence. The grants were of a certain quantity, without any indication of location, except certain outer boundaries, and one was to join with the other. They were emphatically floating grants, and only one had been located and patented, while the other was still unlocated and afloat, and liable to be located anywhere within the larger area embraced within the *diseño*, and might, and probably would, be located outside of the land covered by the patent. And, in fact, it was so subsequently located, as will hereafter be seen.

It was with reference to this particular state of facts, that the questions were discussed, and the rule laid down. The patent was simply held conclusive, as against the still unlocated and floating grant. It was nowhere said or intimated that if both grants had been located upon the same land, and patented, the first located, without reference to the priority of the grant, would have been preferred, and the instructions considered and approved, are very carefully limited to the case of a located and patented grant, against one that is unlocated.

Thus, the seventh is as follows:

“That the patent in evidence by plaintiffs is conclusive as against the defendant, unless there is evidence that the defendant has a title superior to the title of said patent to the land in controversy, under a confirmed Mexican grant, located under the Mexican Government, or under the United States Government.” (13 Cal. 421; see also 8th and 9th instructions, *Id.*)

These instructions imply, that if the defendant's grant had been located, either by the Mexican or United States Government, the plaintiff's patent issued upon the junior grant, might not have been conclusive. Both parties, then,

1871.]

Opinion of the Court—Sawyer, J.

would have had a title from the same “source of paramount proprietorship” (Id. 419), and the question of superiority might be open. Fremont’s case, also, cited in that case from 17 How. 542, was a grant of “ten square leagues, to be located in a district of country which contains above one hundred leagues.” (17 How. 573.) So the case of *Rutherford v. Green’s heirs*, and the other cases cited from the United States Supreme Court, are all essentially floating grants, with no one point fixed with reference to which the land must be located, without leaving any room for the exercise of discretion by the Government. The strongest case therein cited, so far as the present question is concerned, seems to be *Ledoux v. Black et al.* (18 How. 475). But, in that case, the grant was also vague and uncertain, and “one location would answer the calls and descriptions as well as the other.” (Id. 475.) The defendants claimed under an entry made, and patent of the United States issued, under Acts of Congress before the passage of the Act of Congress under which plaintiff’s grantor presented his claim, and the Act subsequently passed, under which it was finally confirmed. The Court, in that case, only recognize the validity of a sale of a “part of the land not necessarily embraced within the tract confirmed.” In all of those cases in which the Court was called upon to decide between two claimants, and a patent prevailed, the opposing claim was but a floating one, or the tract claimed and confirmed had not been patented, and did not necessarily include the land embraced in the opposing patent.

The cases of *Waterman v. Smith* and *Leese v. Clark*, when considered with reference to the facts of the respective cases, and the questions to be determined, do not appear to be in conflict. In the former, it was only necessary to consider the patent in one of the aspects in which it is said it must be regarded, namely, as a quitclaim deed of the United States, taking effect by relation, at the date of the presentation of the petition, and it was in that aspect alone, that it was, in fact, considered. In that, and similar cases, it was unnecessary to carry the relation further, or to consider whether the patent would take effect by relation to the date of the grant.

Opinion of the Court—Sawyer, J.

[April,

In *Leese v. Clark*, the Court evidently does not consider itself as advancing any view in conflict with the decision in *Waterman v. Smith*. On the contrary, it recognizes that case as correctly decided, and says that while the patent, as a deed of the Government, is to be regarded as taking effect by relation at the date of presenting the petition to the Board of Land Commissioners, it is also to be regarded in another aspect, viz: as a record of the Government, of its actions etc., as before stated in this opinion, and in this aspect, that the patent is evidence as to a junior grantee—which was the case then under consideration—of the validity of the grant, of its correct location, and that it relates to the date of the grant. The facts in the case required a consideration of the patent in this aspect—as a record of the action and adjudication by the Government—and it was only upon this view that the decision was put by the Court, or that it can be sustained. The question was directly involved and decided. The action was ejectment, and the case was this: In 1839, Governor Alvarado granted to Leese and Vallejo a tract of land situate at the “landing place of Yerba Buena,” two hundred varas long, by one hundred varas wide. (*Leese v. Clark*, 18 Cal. 538.) The description was uncertain, as will be seen by an examination of the grant, and it was so held by the Court. “That there was such uncertainty in the bounds of the tract as described in the grant in question, is manifest. The location of the line running from the disembarcadero, or landing place, to the playita, or little beach, is one source of uncertainty. That line might be run in several different directions, materially varying from each other, and yet run, in each instance, in a northerly course from the starting point. There are other sources of uncertainty. A delivery of juridical possession was therefore necessary. This proceeding involved a definite ascertainment of the land to be delivered, and for that purpose required a survey and measurement—in other words, a location of the land. The power of locating the land, as a preliminary to its formal delivery, belonged to the Government, and could not be exercised by the grantees, at least, so far as to bind the Government. * * It

1871.]

Opinion of the Court—Sawyer, J.

does not appear from the record whether the Government ever acted in the matter. "Assuming that it did not, the right and power passed to the United States, and could be exercised by them in such manner and at such time as they might deem expedient." (18 Cal. 574.)

This grant was, therefore, inchoate. The description was uncertain, and it was susceptible of different locations, and, like other uncertain grants, required a survey to attach it to any specific tract of land. The grant was made by the Governor, directly, and not by the Pueblo authorities; and it was therefore held that it was necessary to present it to the Land Commission in the name of the claimant. It was so presented, confirmed, duly surveyed, and, in 1858, patented. Plaintiffs claimed under the patent. The opposing claim was under grants from the Alcaldes of San Francisco, made in the month of February, 1847 (20 Cal. 396), before the treaty with Mexico, by which the territory was acquired by the United States. It is settled by numerous cases, that at the date of these grants the Alcaldes of San Francisco had power to grant. This power is assumed in the case for the purposes of the decision. It is said, it is true, that this power was granted to the Alcalde by the Governor and Territorial Deputation. But so far as the present question is concerned, it matters not from what source the power was derived, if it existed; so the Governor derived his power to grant, from some superior source. Both had power to grant, provided the land was subject to grant. The Alcalde's power to grant lands within the Pueblo, not before granted, was unrepealed, and while so existing, his grant was as effective as that of the Governor. The Governor himself could no more have granted land, previously granted, without a proper denouncement, than the Alcalde. Both, at the time, were empowered to grant lands that were open to grant. At the time that these Alcalde grants were made, that portion of the Pueblo lands had been laid off into streets, blocks and lots, the lots being fifty varas square, and said fifty-vara lots were designated on said plat by numbers; and grants were made of such lots by their numbers, in accordance with said plat. These Alcalde grants were so

Opinion of the Court—Sawyer, J.

[April,

made, and the grants being for such fifty-vara lots by their numbers, in accordance with such plat, were, necessarily, of specific and certain tracts of land. They were, necessarily, *located and could apply to no other land*. The Alcalde grant, then, was of *a specific tract of land, located by the very act of making the grant, and it required no further action of the Government*. On the second trial, the judge of the District Court acted upon this theory, and assuming that the *elder grant*, which had been confirmed and passed into a patent, *was inchoate, uncertain and unlocated*; that the *junior grants* by the Alcalde were of *specific tracts and located*, and, therefore, *first segregated from the public domain*, and that the case was entirely similar to the case of *Waterman v. Smith*, charged the jury in accordance with the law, as he supposed it to be laid down in that case (see 20 Cal. 394-6), regarding the patent simply as the deed of the Government, etc., but disregarding the other aspect of the patent, as a record of the Government, etc., as stated in the same case by the Supreme Court on the first appeal, and also in the prior case of *Teschmacher v. Thompson*, (18 Cal. 26).

On the second appeal, the Supreme Court say, that the District Court, among other things, “disregarded the decision as to the operation of the patent as a record of the Government, with respect to the title of the patentees at the date of the cession, and declared that the patent had no greater effect or operation than a simple deed of the United States.” (20 Cal. 416.)

The Supreme Court, also, subsequently admit, that if this latter proposition “can be sustained, the other questions become immaterial;” and, although regarding the first decision as conclusive in that case, yet, in order to correct any error the Court might have fallen into in reference to future cases, elaborately re-examined the question, and reached the same conclusion as that attained on the former appeal. (20 Cal. 420 *et seq.*) In the course of this re-examination, the Court say:

“Treated as the simple deed of the United States, we admit that the operation of the patent is only that of a quitclaim, or rather of a conveyance of such interest as the

1871.]

Opinion of the Court—Sawyer, J.

United States possessed; the deed taking effect by relation at the date of the presentation of the petition of the patentees to the Board of Land Commissioners. We have never asserted any other efficacy to the instrument, as a deed. As a deed, its operation is like that of any other grantor; it passes, and can only pass, such interest as the grantor possessed.

“But the patent is not merely a deed of the United States, it is a record of the Government.” (Id. 421.)
* * * * *

By it, the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid, and entitled to recognition and confirmation by the laws of nations, and stipulation of the treaty; and that the grant was located, or might have been located, by the former Government, and is correctly located by the new Government, so as to embrace the premises as they are surveyed and described.” (Id. 423. See, also, 18 Cal. 571-2.)

It will be seen, then, by careful examination of the case, that the invalidity of the Alcalde grant was not put upon a want of power in the Alcalde to grant, but a want of power to make a grant, that should affect the title of one who had a prior grant to the same land, or that might be located on the same land—that the subsequent grantee must take his grant, subject to the liability of having a prior grant not yet definitely attached to the specific tract located upon it. It will be seen, also, that it is still held that the doctrine of *Waterman v. Smith* is correct, so far as it goes—that is to say, as applicable to the facts of that, and similar cases, where a junior grant has been located, and an elder unlocated grant, not necessarily embracing the same land, is still afloat.

But, under the new state of facts involved in that case, when both grants have become specific, and located upon the same land, other principles are involved, and the patent is to be considered in the other aspect as a record of the Government, and that as such, it is evidence of the validity of the grant, that it is correctly located, and takes effect from the date of the grant.

The case of *Teschmacher v. Thompson*, as I understand the case, was decided upon precisely the same principle, and established the same rule, as to the effect of a patent issued upon a confirmed Mexican grant, regarded in the aspect of a record of the Government. The plaintiff claimed under a patent, issued under a confirmed Mexican grant, which covered the premises.

The demanded premises were alleged in the answer, and assumed by the Court, to have been always, before and at the date of the admission of California into the Union, below the ordinary high tide water mark in the Bay of San Francisco. Defendants claimed that the title was, therefore, in the State of California, and not in plaintiffs. For the purposes of the decision, the Court assumed that the grant upon which the plaintiff's patent issued, "was only for a specific quantity lying in an area of larger extent; * * * that it conveyed only an interest requiring further action of the Government, and that such action was not had previous to the cession; in other words, that it conferred a merely equitable title, which was never perfected under the former Government." (18 Cal. 24.)

This being so, of course, it was subject to be located differently by the Government within the external boundaries indicated in the grant, the full quantity being given.

It might have been located wholly above high tide, excluding the premises in question, and upon the simple theory of the case of *Waterman v. Smith*, that the Mexican Government might have made another grant to other parties of a specific tract of land, within the same external boundaries, it might have made a specific grant of land below high water mark to a third party, and, subsequently, have located plaintiff's grant upon the land above high water mark, and the grantee could not complain. In that event, as the defendants' counsel in the case now under consideration claim, the first grant that became located, even if the junior grant, would take the land. What the Mexican Government might have done, the United States, its successor in interest, might do at any time before filing a petition for confirmation. And so the cases cited from the Re-

1871.]

Opinion of the Court—Sawyer, J.

ports of the U. S. Supreme Court in *Waterman v. Smith*, seem to hold.

The United States only covenanted in the treaty to protect the interests of citizens as they existed, not to give them greater rights than they already had under the Mexican Government. The United States simply took the place of that Government, and succeeded to all its rights and all its obligations respecting those lands.

By the admission of California into the Union, it became, by virtue of its sovereignty, entitled to all the lands below ordinary high water mark, according to *Pollard's Lessees v. Hagan* (3 How. 212), and other cases. Whether the transfer of title, which was before in the United States, to the State, is by implied grant or relinquishment, or in what precise way the transfer was effected, does not very clearly appear. But the title is recognized to have become vested in the State by virtue of its admission. And the land to which the title thus passes, is specific, because it is all the land lying below ordinary high tide, and the ordinary line of high tide is a well-marked natural object, which only requires observation to ascertain. The Court, however, held in this case, as in *Leese v. Clark*, that *the State took the title subject to such location as the Government should make of the Mexican grant under which the plaintiff claimed, and that this grant having been finally located so as to embrace the premises in question, although it was below ordinary high water mark, and upon land which would otherwise have passed to the State upon its admission into the Union, the patent, "as the record of the Government of the existence and validity of the grant, establishes the title of the patentees from the date of the grant."* (18 Cal. 26; see, also, *Stark v. Barrett*, 15 Cal. 366.)

As I understand these decisions, then, where there are two grants from the paramount source of title, and both have become attached to a specific piece of land, and a patent has been issued by the United States to the elder grantee, in pursuance of a decree of confirmation, under the act of 1851, and locations made in pursuance of the Acts of Congress, the patent under the elder grant carries the superior title.

These cases, it is true, are but decisions of a State tribunal, and are of themselves not controlling authority in the national Courts. But the learned Chief Justice who so elaborately and ably discussed the question in the cases cited, is now a Justice of the Supreme Court of the United States, and, as we have seen, that tribunal, in an opinion delivered by him in *Beard v. Federy* (3 Wal. 491-2), has laid down the same rule, in language almost identical.

In speaking of the patent as a record, the Court, in that case, say: "This instrument is, therefore, record evidence of the action of the Government upon the title of the claimant. By it, the Government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former Government, and it is correctly located now so as to embrace the premises as they are surveyed and described." (Id. 492.)

The case of *The United States v. Armijo* (5 Wallace, 444), was an appeal from the final survey of one of the grants involved in *Waterman v. Smith*—the grant which was unlocated at the time of the trial of that case. The claimants under the Armijo grant, insisted that it was the elder grant, and, that being so, they were entitled to have it so located, that it should embrace a portion of the land already patented to the holders of the Solano grant. To what end, if the grant first located would necessarily take the land? But the priority, in fact, only related to the formal title papers. There had been a prior provisional grant to Solano (see *Waterman v. Smith*, 13 Cal. 375). And, although the formal grant to Armijo was first in date, it referred to the Solano Rancho in terms. Solano's rights were recognized in it. And in view of his elder equitable right, the Court say:

"There can be no doubt, as observed by the District Judge, that under the circumstances the rights of Solano, according to the Mexican usages, would have been recognized as superior to those of Armijo in any contest, notwithstanding the formal title issued first to Armijo." (5 Wal. 448.)

The Court refused to allow the location upon the land be-

1871.]

Opinion of the Court—Sawyer, J.

fore patented, because the parties were not entitled to have it so located, for the reason that Solano had the prior equity, as well as the prior location. But it was nowhere intimated that if it should be so located, the location would be fruitless, because the Solano grant had been first segregated and made specific, as is claimed to have been held between those very grants, in *Waterman v. Smith*. This omission to intimate any such result, in the opinion by the same learned Judge who rendered the decision in *Waterman v. Smith*, is, under the circumstances, significant. If he had supposed such consequences would necessarily follow the desired location, he would scarcely have failed to suggest them. But the case of *Rodriguez v. The United States* (1 Wal. 591), bears directly upon the question. That was an appeal from a decree of the District Court, making a final location of a confirmed grant under the act of June 14, 1860. Rodriguez claimed under a grant to one Sanchez, made provisionally in 1838, and ratified by Governor Micheltorena in 1848. In 1842, one Castro obtained a grant which had been finally confirmed, and before the passage of the said act of 1860, finally located and patented. Rodriguez's grant was afterwards surveyed so as not to interfere with Castro's grant as located; but his survey was set aside by the District Court, and, under the direction of the District Court, another was made and confirmed, which included a large portion of the land before patented to Castro under the decree confirming his grant made in 1842. Rodriguez appealed, and the principal ground of error relied on was, that his grant was so located as to include a large portion of the land already patented to Castro's representatives. If so located, he supposed himself liable to lose the land on that ground; hence his appeal. But the Supreme Court, on that point, say (p. 591):

“It is objected to this location of the grant, that it places it on land which has already been confirmed, surveyed and patented to the representatives of Castro. The answer to this is, that we are called on in this proceeding to determine where the grant to the present claimant ought, rightfully, to be located, who was not a party to any of the pro-

Opinion of the Court—Sawyer, J.

[April,

ceedings by which Castro's claim was confirmed, surveyed or patented, and is not, therefore, bound or concluded by either the decree, survey or patent, as expressly enacted by the fifteenth section of the act of 1851; for Castro's survey was made before the act of 1860, and there was no opportunity for this claimant to contest its location. And lastly, it may be added, that the holder of the Castro claim has made himself a party to the present proceeding, and *must be bound by its result.*"

The very point in the case was, as to the propriety of locating a prior inchoate grant, uncertain as to its exact location, upon land already appropriated to a subsequent inchoate grant in terms covering the same land, but first finally located and patented. And the Court unanimously held that it must be so located, and declared that the claimant under the elder patent, being a party to the proceeding, "*must be bound by its result;*" thereby holding that the claimant under the elder grant, although inchoate, and not such as would enable the grantee, at the date of the treaty, to resist any action of the Government affecting its grant or location, is not bound or concluded by the former confirmation, survey or patent, and is, therefore, a "third person," within the meaning of the fifteenth section of the act of 1851. The grant is thus adjudged to be properly located, and the result declared to be conclusive upon the prior patentee—that is to say, that in this instance the elder grant, though subsequently located upon land already confirmed, and patented to the holder of a junior Mexican grant, carries the superior title. And this is the most direct expression of the judgment of the Supreme Court, affecting the question involved in the case now under consideration, that has thus far been made. The further views as to the character of the patent in the aspect of a record of the Government, expressed in *Beard v. Federy*, go to the same result; and these cases both arose under Mexican grants of a similar character in California, and under the same Acts of Congress, relating to the same subject, and therefore are more important and reliable as authorities than those cases arising under other acts, containing very different provis-

1871.]

Opinion of the Court—Sawyer, J.

ions, and prescribing very different modes of proceeding relating to lands in Florida, Louisiana, Missouri, and other States formed out of territory acquired from foreign nations.

In the *United States v. White*, the Supreme Court, also, as well as in Rodriguez's case, recognize the view that any parties claiming under a Mexican grant, though inchoate, are "third persons;" for, in speaking of the conflicting claims which were the subject of observation in that case, the Court remark that the patent issued in that case would only be conclusive on the United States, and would not affect the interests of third parties. (23 How. 253.) Suppose each claimant in that case had presented his grant independently, and they had both been confirmed and patented, would not the question of title have been open to investigation between them, or would the first grant presented and located, even though the junior grant, have been conclusive on the other?

In the cases of *Treadway v. Semple* (28 Cal. 655), and *Semple v. Wright*, (32 Cal. 666), the question arose in the State Courts between two Spanish grants, both confirmed, located and patented, so as to cover the premises in controversy in those actions. The senior grant was first presented for confirmation, but the junior grant was first located and patented. The final locations were both confirmed by the decree of the District Court, the respective claimants being parties to the proceedings.

Citing and following the opinion of the United States Supreme Court in *Rodriguez v. The United States*, the Supreme Court of California held the determination of the District Court to be conclusive upon the proper location of the elder grant, and that it took the land, although the junior grant was first located. In the former case the Court say, with reference to the proceedings to locate the grant under the Act of 1860:

"The proceedings had under this Act, after the return of the survey and plat, are strictly judicial in their character. The parties interested have an opportunity to be heard, and those appearing actually are heard, and their rights litigated

Opinion of the Court—Sawyer, J.[April,

and adjudicated; and when thus finally determined, we see no reason why the matters determined should not, like all other judicial determinations upon points directly in issue, be regarded as *res adjudicata*, and be final and conclusive upon the rights of the parties.” (28 Cal. 659.)

It was held that the action of the District Court was a conclusive adjudication, that the elder grant was properly located and took the land.

This, also, seems to be in strict accordance with the views expressed in Rodriguez’s case. That the proceeding is judicial, there can be no doubt. Under the fourth section proofs are to be taken, “and on hearing the allegations and proofs, the Court shall render judgment thereon.” These proceedings were also held to be judicial in the Fossat case (2 Wal. 712).

In the case now under consideration, like Rodriguez’s case, the junior grant under which defendants claim, was first located and patented, and these acts were both accomplished before the passage of the Act of 1860, so that the plaintiff, who holds the prior grant, was not and could not be in any way a party to the confirmation, location or patent; and, in the language of the Supreme Court, in Rodriguez’s case, he is “not, therefore, bound, or concluded by either the decree, survey or patent, as expressly enacted by the fifteenth section of the Act of 1851; for Castros’ [in this case, Fernandez’s] survey was made before 1860, and there was no opportunity for this claimant to contest its location.” (1 Wal 591.)

The plaintiff’s (Boga) grant was finally located by the District Court under the Act of 1860, and the only difference between this and the Rodriguez case, and the other cases cited from the California Reports is, that the defendants, claimants under the Fernandez grant, did not, in fact, come in and make themselves parties, as they were entitled to do under the Act of 1860. But the third section provides, “That before proceeding to take testimony, or to determine on the validity of *any objection* so made to the survey and location as aforesaid, the said Courts shall cause notice by public advertisement, or in some other form to be

1871.]

Opinion of the Court—Sawyer, J.

prescribed by their rules, to all parties in interest, that objection has been made to such survey and location, *and admonishing all parties in interest to intervene for the protection of such interest.*" (12 Stat. 34, Sec. 3.)

The monition was duly published in this case, and the default of all parties not appearing entered, in pursuance of the usual practice of the Court. This gave the Court jurisdiction, the cause being already pending in the Court on the passage of the Act, and it was properly proceeded with thenceforward under the sixth section.

The proceeding is one somewhat of the nature of a proceeding *in rem* under the statute, in which all parties were bound to intervene and protect their interests. If not there could be no object in this provision of the Act. The proceeding of giving the admonition required would be in vain, if the parties interested were not bound to act upon or notice it. And it is not to be presumed that Congress required a vain thing to be performed.

This proceeding by monition and default is recognized by the Supreme Court in *United States v. Halleck* (1 Wall. 454), and in *United States v. Estudillo* (Id. 716). In the latter case, the District Court refused to set aside the default, on the application of a party who had neglected to appear in answer to the monition, and, on appeal, the Supreme Court held that the action of the District "Court in this respect is not subject to revision, the opening of the default being a matter resting in its discretion." (*Id.*)

This is a recognition of the validity of the default, and, by implication at least, that the parties failing to answer to the monition are bound by the judgment. The Court could have no discretion to act in relation to a void thing.

But the defendants say that the survey, when ordered into Court, did not touch the land patented to them, and that they, therefore, had no interest in the matter. But they were interested in opposing the very change which the United States, the party at whose instance the survey was ordered into Court, sought to have made. The exceptions filed before the monition issued, and the consideration of which was the object sought, particularly pointed out that

the survey was erroneous in this, that it did not locate the land, so as to embrace that already patented to defendants. Thus, the exceptions to be considered, did directly affect the defendants' interest, as much as the interests of plaintiff; and it might as well be said, that Larkin had no interest in the matter, as that the defendants had none. Without the exceptions to the survey, there was nothing to consider. They were the very subject-matter upon which the Court was called upon to act, and the exceptions specially insisted that the grant should be so located as to cover the land patented to defendants. The defendants were more interested in opposing the exceptions than Larkin himself. The defendants, therefore, were parties in interest, and they were admonished to appear "for the protection of such interests." Having failed to appear, after being regularly summoned in the mode prescribed by the statute, and their default having been duly entered in pursuance of the practice of the Court, assuming it to be competent to acquire jurisdiction in this mode, I do not perceive why they should not be bound by the judgment in the same manner, and to the same extent, as if they had appeared.

The plaintiff's grant is the elder grant. The judgment of the District Court is, that it is properly located, as designated in the decree and embraced in the patent. The patent is intended to give effect to the grant, and it relates to the date of the grant, and overreaches the defendants' patent and grant.

Had defendants appeared, this judgment and patent would have been conclusive upon them, unless the Rodriguez case is to be overruled.

If they were bound to appear in answer to the monition to protect their rights, the result must be equally conclusive; and that they were bound to appear, I think there can be little doubt.

But suppose, in consequence of defendants not appearing, the judgment locating plaintiff's land, and the patent in pursuance of such location, are not conclusive, then it follows, under the decision in Rodriguez's case, that neither patent is conclusive; for, if the location of Castro's grant

1871.]

Opinion of the Court—Sawyer, J.

in that case did not affect the holders of the elder grant to Sanchez, because they were not parties to the proceeding, then, for the same reason, the prior location of Fernandez' grant cannot affect the rights of plaintiff, who was not a party to their proceedings.

In that view it might be necessary to determine, anew, whether there was error in the location of the Boga Rancho by the District Court; for, if correctly located, the patent issued upon it being upon the elder grant, would, upon principles of the cases cited, constitute the superior title. If, as the Supreme Court say, the Court is called upon "to determine where the grant to the present claimant ought rightfully to be located," it must be because he is entitled to have the particular land upon which it is "rightfully located"—the land which it was intended he should have when the grant was made.

Upon the question of the rightful location of the Boga grant, no facts were proved on the trial affecting it, other than such as are expressed in the findings; and upon those facts, it does not appear to me that any party uninfluenced by a desire to conform to the prior selection of the claimant, or to avoid locating the grant upon lands already assigned to another grant, would have located it otherwise than it was located by the District Judge.

I have examined the opinion of the District Judge, given in deciding the question of location, and the reasoning seems to me to be conclusive upon the question. The grant and diseño are so specific that little latitude is left for the exercise of discretion in the location. The diseño is by far the most accurate plat of the county embraced in it, of any diseño that has ever been brought to my notice. It is understood to have been made by General Bidwell, from the map of Vioget, the principal surveyor in the country at that time. But this does not appear in the evidence. Since it is a remarkably accurate one, it is not important who made it, or from what data. The only marked inaccuracy appears to be the giving of the wrong number to the parallel of latitude laid down in the diseño. The Sutter case throws some light on the cause of this error. The adoption in the pre-

liminary survey of the designation of the degree, instead of the actual location of the parallel with reference to surrounding objects, by Larkin and the first surveyors engaged in making the preliminary location of the grant, doubtless gave rise to the subsequent difficulties as to the location of the respective grants. The petition of Flugge asks for a tract of land situate “on the western side of Feather River, and stretching along the said river from 39 degrees 33 minutes 45 seconds, north latitude, to 39 degrees 48 minutes 45 seconds, and forming on this line a square one league in breadth, * * * as it is rendered manifest by the annexed sketch.”

The quantity of land is not mentioned in the petition, but it is asked from one line of latitude, as shown by the *diseño*, to the other, “one league in breadth.”

The order for the grant limits the quantity to five square leagues, “its first boundary to be from 39 degrees 33 minutes 45 seconds, northern latitude;” and the formal grant is for five square leagues on the western side of Feather River; “the first boundary to be from 39 degrees 33 seconds, 45 minutes, as the respective sketch explains,” in the language of one translation, or of another, “having its first boundary from latitude 39 degrees 33 minutes 45 seconds north, as appears from the corresponding plan.” The northern boundary is not indicated, either in the order or grant.

It was manifestly intended to adopt the parallel of latitude, as it was laid down on the *diseño*. The decree of confirmation, also, directs the land to be “located in accordance with the calls of the grant, and the boundaries as delineated on the map accompanying the *espediente* to which reference is made. The southern boundary line indicated on the said map by the line marked 39 degrees 33 minutes 45 seconds; and the northern boundary by the line marked 39 degrees 48 minutes 45 seconds, north latitude,” etc. Thus, according to the grant, the “first boundary,” that is the southern line of the land granted, is to be the parallel 39 degrees 33 minutes 45 seconds, as laid down on that map; that is to say, the line so designated on the

1871.]

Opinion of the Court—Sawyer, J.

plat, but, as it is thus located, the northern line is not mentioned. Feather River is to be the eastern boundary. Two boundaries are, then, determined. The petition asks that the land may be one league in breadth, and this is generally regarded as allowed, when nothing is said in the grant to the contrary. The land is then limited to five square leagues, which would require the tract to be five leagues in length to make the quantity. It is only necessary to find the point on the river, where the line, as laid down on the map, crosses it, and project the parallel from that point, to obtain the southern boundary, and we then have all the elements to make a certain location.

Few Spanish grants point out the land intended to be granted with so much certainty as this one. It admits of but one general location, unless the "first boundary" is wholly abandoned, and this cannot rightfully be discarded, either under the grant or decree. If this boundary can be properly located on the land, then upon the principle of the maxim, "*Id certum est quod certum reddi potest*," the location is certain; for it will be a tract of land having the parallel as located for its southern, and Feather River as its eastern boundary, and be one league in width and five leagues long, and that tract can occupy but one general location. This comes very near being the grant of a specific tract. As said in Fossatt's case, there is "no sobrante here," where two lines are given, and the data for finding the others. (2 Wal. 715-16.)

By an examination of the *diseño*, it will be seen that the the Sacramento, Feather and Yuba rivers, Arroyo de Honcut and Los Picos, all well-known and striking physical landmarks, are very accurately laid down, as well as a very large number of particular, and less prominent objects; and the parallel "marked 39 degrees 33 minutes 45 seconds," and the Boga Rancho, located with reference to these objects. By comparing this *diseño* with the plat of Feather River and the Boga Rancho, as finally located and patented, constructed from actual survey, it will be seen, on following the line of the river, laid down on both, that the same bends in the river are found in the corresponding plats,

Opinion of the Court—Sawyer, J.

[April,

and that the southern line in the actual survey of the rancho, as finally located, is drawn just below a bend in the river corresponding with a similar bend on the *diseño*, immediately below which, in a corresponding position, the parallel marked "39 degrees 33 minutes 45 seconds," is drawn. So, also, the Arroyo de Honcut, or Honcut creek, is found on the opposite side of the river, in the same relative position with reference to the southern line on both plats, the said creek flowing into Feather River about the same apparent distance from the southern line as indicated on both plats—the plat of the survey as finally located, and the *diseño*. So far as I am able to judge, therefore, from the two plats, the southern line is located by the final decree, in the same position as on the *diseño*. It is plain, also, by mere mathematical calculation, that there is but one quarter of a degree (15 minutes) in latitude embraced in the *diseño* to the Boga Rancho; and, since the tract embraced in it is but one league in breadth, there is not enough land within the *diseño* to satisfy the two grants, five leagues for the Boga, and four for the Fernandez grant—nine leagues in all—and that the Fernandez grant could not be located within that *diseño* without necessarily interfering with the Boga grant, supposing the southern line of the Boga grant to have been correctly located. It is true, that one witness testified generally, that there was enough land within the *diseño* to satisfy both grants, but this was, manifestly, on an erroneous hypothesis as to the location of the designated parallels. Conceding the southern line of the Boga Ranch, as finally surveyed, to be correctly located, it seems manifest, that it would be impossible to locate that grant within the territory embraced in the *diseño*, without embracing a portion of the Fernandez grant, as patented.

The defendants' counsel have assumed, in their argument, that the southern boundary of the Boga grant is coincident with the northern boundary of the Sutter grant, and that the northern boundary of the Sutter grant is one league below the southern line of the Boga grant, as finally located, and coincident with the southern line of that rancho, as located on

1871.]

Opinion of the Court—Sawyer, J.

the plat which was first ordered into Court, and afterward set aside. But the Sutter tract, or line, is nowhere mentioned in the petition, grant, *diseño* or decree, in the case of the Boga grant. It is not one of the calls, either of the grant or decree. So far as I am able to determine the question from the proofs made on the trial of the case, the final decree of the District Court locating the Boga grant, locates it in strict accordance with the calls of the grant, and of the decree of confirmation. And I do not see that it could have been located in any other way, without violating the calls of the grant and decree, unless by a somewhat strained construction, the location should be extended the entire length of the *diseño*, from the southern line, as actually located, one quarter of a degree north, to the other line laid down on the *diseño*, marked 39 degrees 48 minutes 45 seconds, diminishing the breadth so as to include only five leagues. But, this, I think, would, manifestly, not be to carry out the intent of the grant or decree; besides, it would embrace much more of the Fernandez Rancho than it does as now located. The only other location that could be considered, would be to adopt the true location of the parallels of latitude as designated by the numbers, as was done in the first survey. But this is manifestly inadmissible, as no part of it would then be within the territory laid down on the *diseño*.

If, then, the question of location could be considered as open to examination, as between the parties to this action, I should still, upon the case as presented, be compelled to hold that the Boga grant is located in strict accordance with the calls of the grant, and decree of confirmation. And it does not appear to me to be susceptible of any location within the calls of the grant, or decree of confirmation, as indicated by the *diseño*, that would not necessarily include a considerable portion of the Fernandez grant as located and patented. But, as before stated, in view of the present state of the authorities, I do not regard the question of location as now open. I think the action of the District Court conclusive.

It is further said that the note and stipulation as to third

Opinion of the Court—Sawyer, J.[April,

parties in the patent to the Boga Rancho, in effect excepts the land to the extent of the interference. But it is, plainly, not an exception of the land. It merely states the fact of the interference, and says in virtue of the Act of 1851, the patent shall not affect the interest of "third persons," and, "consequently, shall not affect any valid adverse right, if such exists, to such portion of the land as may be covered by the Fernandez Rancho, patented as aforesaid," without assuming to determine whether there was any valid adverse right, or to except the land from the patent. The Fernandez patent contains a similar stipulation as to the rights of "third persons," and, if the clause in the Boga patent can be regarded as an exception, the same must be said of the clause in the Fernandez patent. Neither is an exception of the land, but only of any adverse right in the lands, if any there is.

There can be no doubt, I apprehend, that any party acquiring an interest in land from the United States, subsequent to the presentation of a claim under a Spanish or Mexican grant for confirmation, would be concluded by the proceedings, not merely on the principle of the doctrine of relation, as suggested in a number of cases, but also upon the principle that every one who acquires an interest in the subject-matter of the litigation from one of the parties to it, *pendente lite*, takes it subject to the result of the litigation, and is estopped from again contesting the matter. It may be that this principle, in respect to Mexican grants, may carry the estoppel back to the date of the treaty, so as to apply to all interests acquired from the United States after the nation became the proprietor of the public domain of California; for the United States, themselves, covenanted to protect the interests of Mexican grantees, not to turn them over to be litigated with individual citizens, as assignees of the United States; and the contest between the claimant and the United States may, in a certain sense, for that purpose, be regarded as initiated, or as existing in an inchoate state from the date of the treaty. If so, these parties would take any interest from the Government, with the understanding in contemplation of the treaty and public

1871.]

Opinion of the Court—Sawyer, J.

law, that the rights of the claimants under the United States should be represented by the Government in the contests to arise under such laws as should be enacted in pursuance of the treaty for procuring a confirmation of existing grants, and be concluded as being in privity with the United States in the proceeding.

The right of grantees under the Mexican Government to have their titles ascertained and protected, attached at the date of the treaty. Time was required to provide tribunals, and a mode of proceeding to adjudicate their rights.

Provision was made at an early date to carry out the obligations of the treaty by the act of 1851, and two years were given within which to present claims. It was not contemplated that there should be a race, or a scramble, for the first confirmation, or that one who should be the most expeditious, or find the fewest obstacles to overcome, or be able to throw the most obstacles in the way of his adversary, should thereby gain an unjust priority. It was, on the contrary, designed that each claimant, pursuing his right within the time allowed, should have that which justly belonged to him, whether early or late at the goal of the contest.

I see no good reason, therefore, why, when a claim has once been presented within the time allowed, the presentation should not be regarded as relating to the date of the treaty, when the obligation on the part of the United States attached, and all stand in this particular upon a common footing. The United States assumes the obligation at that point of time, and from that moment the proceeding may well be regarded as *in esse*, so far as that all parties subsequently acquiring interests from the United States should be bound by the result, leaving the rights of conflicting claimants under confirmed Mexican grants to be determined in the tribunals of the country, in the first proceeding wherein both parties have an opportunity to be heard according to the rights and equities, as they actually existed at the date of the treaty.

But, whatever the principle upon which the conclusions rest, so far as Mexican grants in California, and the treaty and Acts of Congress especially applicable thereto are con-

cerned, the results indicated appear to me to be clearly deducible from the authorities, as they now stand.

I have examined a large number of cases decided by the Supreme Court of this State, and of the United States, and endeavored to extract therefrom the principles thus far settled, bearing upon the questions at issue, and to apply them to the facts of this case without advancing any theories of my own. If I have not misapprehended the decisions, they furnish principles either expressly determined, or clearly foreshadowed, sufficient to indicate the judgment that should be entered. But if I have erred in my conception of the law, as laid down by the Supreme Court, or in the opinions which I have been called upon to consider, of any of the learned Judges now constituting that Court, I shall, doubtless, be set right upon a review of the case on writ of error. After giving the case the best consideration I am able to bestow upon it, the following conclusions have been attained :

First—That the plaintiff's cause of action is not barred by the Statute of Limitations.

Second—That the selection, by Larkin, of the tract as located by the preliminary survey, and by the first survey made after the decree of confirmation became final; his claim of the tract so selected, as the land granted to Flugge, and his acts relating thereto, do not estop said Larkin, or those deriving title through him, from now claiming the land as finally located by the District Court and patented.

Third—That the fact that the Fernandez grant was first presented for confirmation, and was first finally surveyed and patented, is not conclusive evidence of title, as against the claimants under the Boga grant.

Fourth—That the holders of the Boga grant, it being the elder grant first finally confirmed, with boundaries, both in the grant and decree of confirmation, so definitely described as to admit of but little variation in the location, and it having been finally located and patented so as to include a portion of the land covered by the patent issued under the Fernandez grant, are "third persons" with respect to the Fernandez grant, within the meaning of the fifteenth section of the Act of 1851, and they are not concluded by the prior final location and patent of said latter grant.

1871.]

Opinion of the Court—Sawyer, J.

Fifth—That the survey of the Boga grant having been made and approved by the Surveyor-General of California, and returned into the District Court by order of said Court, and proceedings for the purpose of contesting and reforming the same being pending in said Court, at the date of the passage of the Act of Congress of June 14, 1860, relating to the subject, the said District Court had jurisdiction under said Act, to revise said survey, and determine by its judgment or decree, the true location of said grant.

Sixth—That since the exceptions filed to said survey directly affected the interests of the claimants under the Fernandez grant, said claimants were parties in interest, who were authorized and required by the provisions of said act, upon due notice, to “intervene for the protection of such interest.”

Seventh—That due notice, admonishing all parties in interest to appear for the protection of their interests, having been given, in accordance with the provisions of said act, and the rules and practice of said Court, and the said claimants under the Fernandez grant having failed to appear, and the default of all parties who did not appear having been duly entered in pursuance of the rules and practice of said Court, the said claimants are bound by said proceedings in the same manner and to the same extent, as they would have been bound had they intervened in said proceeding.

Eighth—That said proceedings are judicial in their nature, and are conclusive upon the parties in interest appearing, or who, being duly admonished, fail to appear, but make default, and their privies, and the proceedings in this case are conclusive upon the defendants, as to the true location of the Boga grant.

Ninth—That the Boga grant being the elder grant, and being correctly located in accordance with the calls of the grant, and decree of confirmation, the patent is evidence of title from the date of the grant.

Tenth—That at the date of commencement of this action, the plaintiff, by title derived from Thomas O. Larkin, the patentee of the Boga grant, was seized in fee, of an un-

divided three fourths part of the premises described in the complaint.

Eleventh—That the defendants had no title, as against the patentees of the Boga grant, and as against said patentees, were in the wrongful possession of said premises, and they wrongfully and unlawfully withhold the same from the plaintiff.

Twelfth—That said plaintiff is entitled to judgment for possession of said premises, and for his costs of suit.

Let judgment be entered for plaintiff for possession of the premises described in the complaint, and for costs of suit.

THE CALIFORNIA.*

DISTRICT COURT, DISTRICT OF OREGON,
APRIL 17, 1871.

1. SECRETARY OF PILOT COMMISSIONERS, APPOINTMENT OF.—Section 2 of the Oregon Pilot Act, as amended in 1868, provides that the Pilot Commissioners “may appoint a Secretary” and prescribes his duties: *Held*, that it is the absolute duty of the Commissioners to appoint such Secretary; and that parol evidence is not admissible to prove the meeting and action of such Commissioners concerning the licensing of a pilot, when the act requires a record of the same to be made by the Secretary.
2. PILOT LICENSE, SIGNATURE OF COMMISSIONERS.—A pilot license signed by all three of the Commissioners is *prima facie* evidence of the facts stated in it concerning the examination and licensing of the pilot to whom it purports to be granted; but if only signed by two of such Commissioners, the case is otherwise, unless it also appears from the minutes of the board that the matter was acted upon and the license granted at a meeting of the Commissioners when all three were present; or such license contains a direct recital or averment of such meeting and action in reference to such license.
3. *IDEM*.—The power conferred upon a pilot commissioner by the act is a personal trust to be exercised for the public good, and cannot be delegated to another; and therefore one of such Commissioners cannot authorize another to sign his name to the license, although it has been agreed or concluded between such Commissioners, that such license may be granted.

*Affirmed on appeal in the Circuit Court, May 20, 1871.

1871.]

Opinion of the Court—Deady, J.

Before DEADY, District Judge.

William Strong, for Libellant.

Joseph N. Dolph, for Claimant.

DEADY, J. On January 28, 1871, this cause was before this Court upon exceptions for impertinence to the special amended answer of the claimant, when it was held that the claim for half pilotage, stated in the libel, although given by the State statute, could be enforced in Admiralty against the vessel.

On March 21 and 25, the cause was tried upon the questions of fact arising upon the libel and the negative allegations in the general answer thereto.

SAWYER, Circuit Judge. By a stipulation of the parties filed March 20, it is admitted as follows:

I. That on August 7, 1870, both the libellant and Hays, the then master of the steamship, were duly qualified and licensed under the laws of the United States, to pilot the steamship *California* from Astoria over the Columbia river bar to the open sea.

II. That on August 7, 1870, the said steamship was a sea going vessel of more than twenty-five tons burden and drawing thirteen and a half feet of water, and was then lying at the port of Astoria, about to proceed over the bar of the Columbia river to the open sea on a voyage to the foreign port of Victoria, and that libellant then and there hailed said steamship and offered to the master thereof his services as pilot, to pilot said steamship over said bar to the open sea, but said master refused to accept said services; and that prior to such offer of services no pilot licensed under the laws of Oregon, had offered his services to pilot said steamship on said voyage.

III. That on August 7, 1870, said Hays was not licensed as a pilot upon said bar by the Pilot Commissioners of Oregon; but did, after his refusal to accept the services of libellant as aforesaid, pilot said steamship over said bar to the open sea, on the voyage aforesaid.

Opinion of the Court—Deady, J.

[April,

Among others, the amended answer puts in issue the allegation of the libel that on August 7, 1870, the libellant was duly qualified and licensed under the laws of Oregon to pilot said steamship over said bar. The admissions contained in the stipulation establish all the allegations of the libel contested by the answer except this. To support this one, upon the trial, the libellant offered to prove by Thomas J. Dryer.

That about August 1, 1870, he was one of the State Board of Pilot Commissioners for the Columbia and Wallamet rivers, and that about that time, there was a meeting of the Board at Astoria, at which time witness said to the other two Commissioners that he had crossed the bar with the libellant and believed that he was qualified to serve as pilot thereon, and that at said meeting it was agreed by the commissioners to grant libellant a "Branch," but that witness being anxious to return to his home, at Portland, did not remain to sign the Branch, but told Mr. Taylor, one of the commissioners to sign his name to said "Branch;" and that the steam tug was doing duty on the bar before August 7, 1870, and the libellant was acting as master of her.

He also offered in evidence a paper, entitled "Certificate of Branch Pilot," addressed "To whom it may concern," dated, "August 1, 1870, and signed J. Taylor, William F. Kippin and Thomas J. Dryer *per* J. Taylor, Commissioners."

The body of the certificate states that "We Jas. Taylor, Thos. J. Dryer and Wm. F. Kippin, having been duly elected and commissioned Pilot Commissioners on the Columbia and Wallamet rivers, in pursuance of an act of the Legislative Assembly of the State of Oregon, approved October 17, 1860, entitled 'an act for the establishment of a pilotage on the Columbia and Wallamet rivers,' and having duly qualified in said office, having first examined A. D. Wass, attached to the steam tug Astoria as employee and master, as to his qualification to act as pilot, and deeming the appointment of said A. D. Wass necessary for the commercial interests of said Columbia river and bar, we do hereby, by these presents appoint the said A. D. Wass * * master, to be and act as pilot," etc. In the place where stars are

1871.]

Opinion of the Court—Dedy, J.

inserted, there is in the original, as appears to me, the word *as* and the word *the* written over it with different ink, but no question is made about the alteration.

The evidence when offered was objected to by counsel for claimant as incompetent to prove the fact alleged—that the libellant was, at the date mentioned, a duly qualified and licensed pilot under the laws of Oregon, etc. After argument the evidence was received, subject to the question of its competency and legal effect. Thereupon the libellant rested and the claimant also.

Before proceeding to consider the question arising upon the objections made to this testimony, it will be necessary to state briefly some of the provisions of the State Pilot Acts, regulating pilotage on the Columbia and Wallamet rivers.

Section 1 of the act of October 17, 1860 (Or. Code, 840), declares that there shall be a Board of Pilot Commissioners constituted and appointed as therein provided.

Sec. 2 of the same act as amended by section 1 of the act of October 28, 1868, provides: “That the Legislative Assembly shall biennially elect three Pilot Commissioners, who are experienced in nautical affairs, and who shall constitute said Board; and said Board may appoint a Secretary and fix his compensation, whose duty it shall be to keep correct minutes of all the proceedings of the Commissioners, in books to be provided by them for that purpose, and register the names of all pilots with the dates of their license or branch, and place of residence; also to keep a register of all vessels arriving and departing—their class, tonnage, draft of water, and amount received for pilotage and tonnage.”

Sec. 2 of the act of October 21, 1864, as amended by the last mentioned act, appointed three commissioners, and authorized them to contract for a steam tug, to be kept on the Columbia river bar, under a subsidy from the State, for the term of five years, for the purpose of pilotage and towage, and also provided that when this contract should be made, and the Pilot Commissioners aforesaid should examine and license the master and other pilots in the employ of said tug, and no others, so long as the owners thereof should comply with their contract.

The first point in the argument of counsel against the admissibility of this evidence is, that under section 2 of the Act of 1860, as amended by that of 1868, it is the duty of the Pilot Commissioners to appoint a Secretary, who must keep minutes of their proceedings, including the application, examination, and licensing of pilots.

In reply, counsel for the libellant insists that the words of the section “may appoint a Secretary,” are merely permissive and not mandatory, and therefore it is optional with the Board whether they will appoint such Secretary, and have such minutes kept or not.

The question to be determined is, what was the real intent of the Assembly, taking into consideration all the circumstances, in enacting the section in question? Considering the propriety and importance, both to the public and individuals, of the performance of the duties required of the Secretary by this section, I have no doubt but that the Legislature intended to impose upon the Commissioners the absolute duty of appointing this Secretary as the necessary and only means provided to secure “correct minutes” of the proceedings and other important matters mentioned therein. The section, in fact the whole of the Act of 1868, is awkwardly and clumsily constructed and unskilfully worded, but the intent in this particular appears tolerably plain.

In *Supervisors v. United States ex relatione* (4 Wall. 335), it was decided that a statute of Illinois, which provided, that where the ordinary revenues of a county were not sufficient to discharge its indebtedness, the Board of Supervisors, “may, if deemed advisable,” levy a special tax for that purpose, was not merely permissive, but peremptory. In the language of the syllabus, the Court held: “That where power is given by statute to public officers, in permissive language—as that they ‘may, if deemed advisable’ do a certain thing—the language used will be regarded as peremptory when the public interest or individual rights require that it should be.” The case at bar is a much plainer one than this, that the intent of the Legislature in enacting the provision was peremptory in fact, although expressed in a permissive form.

1871.]

Opinion of the Court—Deady, J.

There is no evidence before the Court as to whether any minute of the licensing of the libellant was made by the Secretary of the Board or not. It being the duty of the latter to appoint a Secretary, and his to keep a minute of such transactions, it is reasonable to suppose that if the libellant was ever duly licensed, there was a proper entry made of this fact as well as of his previous application and examination.

This being the case, it follows that parol testimony is not admissible to prove the meeting of the Commissioners and examination of the libellant. To admit it, would violate the rule requiring the production of the "best evidence of which the case in its nature is susceptible" (1 Green. Ev. § 82, Or. Code, p. 319, § 681, p. 330, § 733); which in this case, is the minute book of the Commissioners or a certified copy thereof.

Rejecting then for this reason, the testimony of the witness Dryer, as to the alleged meeting of the Commissioners and the licensing of the libellant, it remains to be considered whether the "certificate" or "branch" offered in evidence is sufficient upon its face to prove that the libellant was duly licensed as a pilot under the laws of Oregon as alleged in his libel, when he hailed this steamship.

The only evidence in the case which tends to show that in pursuance of the statute above cited, a tug had been placed on the bar prior to August 1, 1870, is the testimony of Dryer, that the steam tug was doing duty on the bar before that time, and the libellant was acting as master of her. the name of the tug is not mentioned, and the evidence is very indefinite as to the nature of the employment in which that tug was engaged. The contract for and acceptance of the tug can be shown by better testimony than parol. But I suppose, the fact that a tug of which libellant was master, was doing duty on the bar as a pilot boat at a particular time may be shown by parol. As the case stands, the fact itself is probably not very material, and it was as I understood, tacitly admitted on the argument by counsel for claimant. But it cannot be inferred from that fact alone that the master of the tug was at the same time a licensed bar pilot. Because of his position on the tug he would be

entitled to a license if examined and found qualified by the Commissioners, but not otherwise.

It must appear from the "certificate" or "branch" offered in evidence, that the libellant was qualified to pilot this steamship or else he cannot maintain this suit for pilotage. The power to examine and license pilots is conferred upon the Commissioners jointly as a Board, and not on any less number of them. But by force of section 509 (Or. Code, 275), I am satisfied that a majority of them may act in a given case, but only upon the meeting of all. It reads: "Whenever any authority is conferred upon three or more persons, it may be exercised by a majority of them upon the meeting of all, unless expressly otherwise provided."

This certificate contains no direct averment that the three Commissioners met and acted in the matter of granting the libellant a branch. If it did, it might be sufficient if only signed by two of them. What it does aver is, that "we," A. B., C. D. and E. F., "examined," and do "appoint," etc. Now, who "we" are, is only to be ascertained by examining the signatures to the instrument. "We" is used distributively, and each of the persons included in it speaks and signs for himself. Although the body of the instrument may state that "we," A. B., C. D. and E. F. did so and so, this is no evidence that either of them did anything of the kind, except as to those whose names appear signed to it. True, any two of the Commissioners might sign a certificate stating directly that all three met and acted in a particular matter, and whether this would be sufficient evidence of the fact or not, it would be at least an assertion of the two to that effect. But in this case the statement—"we," A. B., C. D. and E. F.—although joint in form is several in effect, and amounts to nothing more than a statement by each person who signed the instrument that he did or knew the matters therein stated. As used, this certificate, "we" is equivalent to the "undersigned," and includes no one who did not sign it. So the matter turns upon the fact of whether or not it appears upon the face of the certificate, that all three of the Commissioners signed it. If it does so appear, the necessary implication is, that

1871.]

Opinion of the Court—Deady, J.

they all met and acted in the matter, at least until the contrary is shown by the minutes or records.

As has been stated, the certificate appears to have been signed by two persons styling themselves Pilot Commissioners, and one of these two for a third. The reasonable and almost necessary inference from this fact is, that the third person, whom these two style a Commissioner, was not present, or he would have signed in person, and not by an agent.

Even if the parol testimony were considered, the conclusion in this respect would be the same. For although Commissioner Dryer states that he was present with the other Commissioners when the matter of licensing libellant was considered, or more probably speaking talked about—still, it directly appears that he was not present when the certificate or branch was granted—signed and delivered. Until this license, branch or warrant (it is called by all these names in the act) was signed and delivered by the board, the matter was not determined and either of the Commissioners might change his mind and refuse to grant or allow it.

Nor could Dryer delegate to any one the power to grant or sign this license. The power given by the act to these Commissioners to examine pilots, and grant or refuse them licenses, is an important one. It is a public trust committed to them and each of them, which cannot be delegated to third persons. (*Sinclair v. Jackson*, 8 Cow. 582; Storey's Stat. Agency, § 13; 7 Opin. 594.)

“In all cases of delegated authority, where personal trust or confidence is reposed in the agent, and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another unless there be a special power of substitution. Such is the rule in relation to powers created by deed or will; and a *fortiori* is it so, where the authority is conferred by act of the Legislature.” (*Lyon v. Jerome*, 26 Wend. 485.)

In the argument for libellant it was substantially admitted that a Pilot Commissioner could not delegate his authority to examine and license pilots, but it was contended that here was no such delegation of authority by Dryer, but

only the writing of his name with consent by another, after the thing to be done had been agreed upon by all. Without admitting that the name of a public officer can be signed to an official paper under any circumstances, by any other hand than his own, there is no ground for asserting that this transaction amounted to nothing more than that. It must be borne in mind, that upon the face of the paper and from Dryer's testimony as well, it appears that he was absent when the certificate was granted—signed and delivered. Now this is a very different thing from the mere mechanical act of one person writing another's name upon a paper in the immediate presence of and by the special direction of the latter. From a careful consideration of the premises, I conclude:

I. That the pilot act of 1868 contemplates and requires that the proceedings by and before the Commissioners shall be recorded—reduced to writing in a book to be procured by them for that purpose—and that this record is the best evidence of such proceedings.

II. A license signed by all the Commissioners is *prima facie* evidence of the facts stated in it concerning the examination, qualification and licensing of the pilot to whom it purports to be granted; but when such license is only signed by two of such Commissioners, it is not a valid instrument, unless it further appears from the minutes of the board, that the matter was acted upon and the license granted at a meeting of the Commissioners when all of them were present, or unless such license contains a direct recital or averment of such meeting and action in reference to such license.

III. That the alleged pilot "certificate," offered in evidence by the libellant, being signed by only two persons, and there being no evidence in either the recitals or averments contained therein, or from the minutes of the Commissioners, that it was granted at a meeting of the board where all were present, is not competent evidence that the libellant was a duly qualified pilot under the laws of Oregon, on August 7, 1870, as alleged by him in his libel.

A decree will be entered dismissing the libel, and for the claimant for costs and expenses.

1871.]

Opinion of the Court—Hillyer, J.

In re MARK STROUSE.

DISTRICT COURT, DISTRICT OF NEVADA,
MAY 19, 1871.

1. **PRODUCTION OF BOOKS.—INTERNAL REVENUE ACT.**—Proceedings under the 14th section of the Revenue Act to compel the production of books, and giving of evidence before an Assessor, are civil, and not criminal.
2. **IDEM.—ACT CONSTITUTIONAL.**—The examination of the books of a person under that section, is not an infringement of Article 4 of amendments to the Constitution of the United States, protecting persons from unreasonable searches, etc.
3. **DISCLOSURES PROTECTED.**—Disclosures so made, are protected by the Act of February 25, 1868, and cannot be used against the person making them before any Court or officer of the United States.
4. **MUST PRODUCE BOOKS AND TESTIFY.**—The person summoned before the Assessor, must not only produce his books, but must submit them to examination, and testify concerning entries therein.
5. **AMENDMENT.**—Section 14 of the Act of June 30, 1864, as amended by Section 9 of the Act of July 13th, 1866 (14 St. at Large, p. 101), construed.

Before HILLYER, J.

Attachment for contempt in refusing to permit examination of books by Assessor of Internal Revenue, and refusing to testify before the Assessor, in pursuance of the provisions of the Internal Revenue Act.

Wm. S. Wood, U. S. District Attorney, for the United States.

H. K. Mitchell, for respondent.

HILLYER, J. In this case Mark Strouse was summoned before the Assessor to give testimony and produce his books relating to his business between the first day of May, A. D. 1869, and the thirtieth day of November of the same year. The proceeding was taken under the 14th section of the Act of Congress of June 30, 1864, as amended by section 9 of the Act of July 13, 1866. (14 Statutes at Large, p. 101.)

At the time and place designated in the summons the respondent, Strouse, appeared with his books, but refused to

Opinion of the Court—Hillyer, J.

[May,

permit any examination of them by the Assessor, or to answer questions, upon the alleged ground that the books, if received in evidence, would criminate him, or would furnish a link in a chain of testimony which might criminate him. The Assessor then applied for an attachment against said Strouse, by virtue of which he was brought before the judge of the District Court and a hearing had.

The respondent asks to be discharged without compliance with the summons of the Assessor upon three grounds:

1. That his answers and books would tend to criminate him.

2. That the examination of his books would infringe that Article of the Constitution of the United States which protects the people from unreasonable searches and seizures of their persons, houses and effects. (Art. 4, Amendments.)

3. That he can only be compelled under the 14th section to produce his books, and cannot be required to submit them to the inspection of the Assessor, or to testify from them.

As to the first ground it is true that, under the Constitution of the United States, no man can be compelled to be a witness against himself in a criminal case. (Art. 5, of Amendments.) But it has been held by Judge Lowell of the Massachusetts District, and I think correctly, that this is not a criminal, but a civil proceeding. (*Lee v. Chadwick*, 11 Vol. Internal Rev. Rec. p. 133.) The respondent is charged with no crime. He has refused to be examined because he believed the examination to be illegal, and it is not to be presumed that any judge will punish a person for the assertion of what he, in good faith, believes to be a legal right, though shown finally to be an error. The law authorizes the Assessor to summon the respondent before him to answer questions touching his returns and assessments.

It is no more a "criminal case" than summoning a witness to testify, or a bankrupt to appear before a register or judge and answer interrogatories. The answers of Mr. Strouse may be testimony which will increase his tax and thus be against himself, but he is a witness against himself in a civil proceeding having no element of a "criminal case."

1871.]

Opinion of the Court—Hillyer, J.

This being so it was argued that the testimony given might be used against the witness on some future trial for the commission of a crime. I think this objection is no longer of any force since the passage of the Act of Congress of February 26, 1868 (15 Statutes at Large, p. 37), for the protection of persons making disclosures as parties, or testifying as witnesses. This act provides that disclosures and evidence obtained by means of any judicial proceeding from any party or witness, shall not be used against him in any manner before any Court of the United States or any officer thereof. Judge Underwood, of the District of Virginia, holds the disclosures and evidence given under section 14, to be fully protected by this act. (*In re Phillips*, 10 I. R. R. 107; and see, also, *People v. Hackett*, 24 N. Y. 83; and *In re Meadors & Brothers*, 10 I. R. R. 74.) Again, the constitutional protection applying only to criminal cases, Congress would have power to change the old rule of evidence and require a witness to give evidence in a civil case, even though it did tend to criminate himself. This testimony, not being given voluntarily, might upon a trial of the witness for the crime, be excluded upon another well known rule of evidence regarding admissions.

Second—Upon the second ground that this requirement to produce the books is an unreasonable search, it need only be remarked that the fourth amendment, supposed to be violated, like the clause of the fifth referred to above, is applicable to criminal cases only. The opinion of Judge Erskine in the case of the Meadors cited above, leaves nothing to be said on this point.

Third—The third point is upon the construction of the 14th section.

It was contended on the argument that the person summoned when he appeared and “produced” the books mentioned in the summons, had complied with the law, and could not be required to submit them to the inspection of the Assessor, or to exhibit particular items to him. The language of the section is, * * * “it shall be lawful for the Assessor to summon such person, his agent, or other person having possession, custody or care of books of ac-

Opinion of the Court—Hillyer, J.

[May,

counts, containing entries relating to the trade or business of such person, or any other person he may deem proper, to appear before such Assessor and produce such book, at a time and place therein named, and to give testimony or answer interrogatories under oath." * * * It is too plain for argument that no effect would be given to this language if the person summoned might, after producing the books, refuse to permit any examination of, or testify as to entries in them. The command of a subpoena *duces tecum* is that the witness "bring with" him certain described books or papers, but who ever heard of such witness contending that he had only to bring the books with him and need not exhibit or testify from them. The Bankrupt Act gives the Court power in certain cases "to compel the production of books and papers," and I have never heard of a witness being excused from exhibiting the books or testifying to entries in them upon the ground that the law gave power to compel only the "production" of the books. In all these cases the only reason for producing the books is to use them as evidence, so far as they are competent upon the inquiry being made. This section is remedial, not penal, and must be liberally construed so as fairly to carry out the intention of the lawmaker. To do this the books must not only be produced, but the entries relating to the trade or business of the respondent must be exhibited and proper questions concerning them answered. It is not doubted that the Assessor will discharge this delicate and somewhat disagreeable duty with all proper regard for the natural feeling of repugnance which every citizen engaged in business has, to disclosing his business affairs to third persons. The revenue law denounces heavy penalties against any Assessor who shall be guilty of wilful oppression in the discharge of his office, and it must be presumed that he will do his duty—no more and no less.

It is ordered: That the said Mark Strouse, in obedience to the summons of the Assessor, W. F. Myers, appear before said Assessor forthwith, and answer under oath or affirmation concerning the trade or business of said Strouse, from May 1, 1869, to November 30, 1869, and give evidence ac-

1871.]

Syllabus.

according to his knowledge respecting his liability as a person subject to an excise duty or tax under the internal revenue laws of the United States; and, also, that he produce to the said Assessor all books of accounts containing entries of purchases and sales relating to his trade or business, from May 1, 1869, to November 30, 1869, and exhibit such entries to said Assessor, and answer touching the same, fully.

It is further ordered: That upon complying fully and fairly with the foregoing order, the said Mark Strouse be discharged from arrest.

J. R. LAMB *et al.* v. I. A. DAVENPORT *et al.*, AND
I. A. DAVENPORT *et al.* v. J. R. LAMB *et al.*

CIRCUIT COURT, DISTRICT OF OREGON,
MAY 20, 1871.

1. CONSTRUCTION OF CONTRACT.—In construing a contract, Courts will consider the condition of things existing at the time it was made, and with reference to which the contract was executed.
2. JUDICIAL KNOWLEDGE.—Courts will judicially take notice of matters of public history, such as the general condition of the country, and of the titles to lands in Oregon prior to the passage of the Act of Congress of September 27, 1850, called the "Donation Act."
3. POSSESSION.—PUBLIC LAND.—As between individual citizens, rights to the possession of the public lands have been recognized and protected by the Courts of the Territories and new States, and of the United States, and acquiesced in by the Government.
4. CONTRACTS IN PARI MATERIA.—Where several successive contracts are made between the same parties in respect to the same subject matter, and apparently in pursuance of the same general purpose, they are in *pari materia*, and may be read together, and considered in the light of the surrounding circumstances, for the purpose of ascertaining the intent designed to be expressed by the parties in some particular covenant in one of the contracts.
5. WHOLE INSTRUMENT CONSIDERED.—Where the language of the covenants in a contract is more comprehensive than that of the recitals, the intent will be ascertained from a consideration of the entire instrument.
6. FACTS STATED.—On March 10, 1852, Lownsdale, Coffin and Chapman were in the joint occupation of a land claim in Oregon, which had been laid out into town lots, and before that time had jointly and severally sold lots, or the possession of lots, throughout the claim to divers persons,

Syllabus.

[May,

and to one another, and thereupon, to enable themselves to notify upon and obtain patents for separate tracts of said claim under the Donation Act of September 27, 1850; said L., C. and C. entered into an agreement to partition the land claimed between them, and also covenanted therein with one another, that when they should obtain patents to said separate tracts, each of them would make good and sufficient deeds for all lots sold as aforesaid in the part or tract so patented to him: *Held*,

- 1st. COVENANT CONSTRUED.—That said covenant, as to lots before sold by said parties jointly, or by any of them separately, is a covenant for the benefit of the vendees of said lots, and those claiming under them, and not of the covenantors themselves.
- 2d. TITLE VESTED IN TRUST.—That upon the acquisition of the title from the United States by said Lownsdale, in pursuance of said covenant and Act of Congress, the said covenant to acquire the title for the benefit of the said several vendees of the lots before sold became executed, and the title thereto vested in said Lownsdale, but in trust for the benefit of said prior vendees.
- 3d. BENEFICIARIES MAY SUE.—That the said prior vendees, for whose benefit the said covenant was made and the title acquired to said lots sold, are entitled to maintain actions in a Court of Equity in their own names, to enforce the trust and compel a conveyance of the legal title.
- 4th. CONTRACTS PRIOR TO DONATION ACT VALID.—That sundry agreements relating to the land entered into by Lownsdale, Coffin and Chapman, and each of them, prior to the passage of said Donation Act, are valid contracts.
- 5th. SAID SUBSEQUENT AGREEMENT VALID.—That the said agreement containing said covenant to acquire the title to lots sold, for the benefit of the prior vendees of the parties to it, is not a "future contract for the sale of the land," within the meaning of the provisions of the fourth section of the Donation Act, and is not made void by the act; but the said agreement is valid.
- 6th. DONATION ACT.—PRESENT GRANT.—That, as to existing settlements commenced before the passage of said Donation Act, the said act is a grant *in presenti* to the party entitled under the act, and it vested the title in fee from the date of its passage, subject only to be defeated by a failure to perform the conditions subsequently prescribed in the act.

Held further, per DEADY, J.

- 7th. TRUST IMPOSED BY AGREEMENT.—That the agreement aforesaid being executed as between L., C. & C., and they and each of them having an estate in the land at the date thereof, which was partitioned and perfected by means of said agreement and the action of said parties thereunder, a trust was imposed upon the land obtained by each of them in favor of the purchasers, or their assigns, as to all the lots before that time sold therein by either or all of them as aforesaid, which trust could be enforced in equity by said purchasers or their assigns, although they are mere volunteers from whom no consideration moved in the premises.
- 8th. RIGHTS OF PURCHASER, DONATION ACT.—That the purchaser of a town lot from a land claimant or settler, under the Donation Act, did not contribute in any way to the acquisition of the title by such settler—the

1871.]

Opinion of the Court—Sawyer, J.

mere possession of such purchaser, whether actual or constructive, being derived from and subordinate to that of the settler, and being in itself not sufficient to enable such purchaser to acquire the title to said lot from the United States under the Donation Act, as against such settler or otherwise.

9th. AGREEMENT NOT A FUTURE CONTRACT.—That the agreement of March 10, 1852, aforesaid, is not a “future contract for the sale of the land” to which the parties thereto were entitled under the Donation Act, but rather an agreement concerning past sales and transactions, made for the purpose of securing conveyances to be made of lots therein, in pursuance of sales made prior thereto, and is therefore not within the prohibition against future contracts in section 4 of said act.

Before SAWYER, Circuit Judge, and DEADY, District Judge.

Bill in Equity and Cross-Bill.

W. Lair Hill, W. W. Thayer and E. C. Bronaugh, for complainants in original bill.

W. W. Chapman and W. F. Trimble, for Davenport, complainant in cross-bill.

SAWYER, Circuit Judge. The complainants in the original bill are a part of the heirs of D. H. Lownsdale, deceased. As such heirs, they claim to be seized in a fee of undivided parts of lots 2, 5, 6 and 7, in block 13, in the city of Portland; and the object of the bill is to obtain a partition. A larger tract of land, embracing the lots in question, was patented by the United States to said D. H. Lownsdale, deceased, June 15, 1865, under the Act of Congress of September 27, 1850, relating to public lands in Oregon, commonly called, “the Donation Act.” The other heirs, and I. A. Davenport are made defendants—the latter because, as is alleged, he claims some interest in the land, through one Stephen Coffin, and, also, some equitable title derived from said Lownsdale; but it is denied that he has any interest, legal or equitable; and a decision is asked that the question of title be determined, and that the lands may be partitioned.

Davenport answers the bill, and then files a cross-bill against the heirs of said D. H. Lownsdale, deceased, in which he sets up a state of facts, which, he insists, estab-

Opinion of the Court—Sawyer, J.

[May,

lishes an equitable title to said lots 2, 5, 6 and 7 in block 13, in himself, and prays that it be decreed, that the said heirs of Lownsdale, defendants in the cross-bill, hold the legal title to said lots in trust for said Davenport; that they be enjoined from further setting up any claim of title thereto, and that they convey the legal title to said Davenport. It is conceded that the legal title is in the heirs of Lownsdale, and that they are entitled to the partition prayed for, unless the matters set up in the cross-bill are true in fact, and sufficient in a Court of Equity to entitle the complainant therein to the relief demanded.

The following facts, among others, are alleged in the cross-bill, and either admitted by the answer, or satisfactorily established by the testimony. Prior to March 30, 1849, said Daniel H. Lownsdale was, under the rules, regulations and usages, as they existed under the Provisional and Territorial Governments of Oregon, the owner, and in possession, of a land claim, purchased by him of one Pettigrove, containing six hundred and forty acres of land, known as the Portland Land Claim, on the left bank of the Wal-lamet river, in the then county of Tuality, with valuable improvements thereon—said possession of the land and claim dating from September 22, 1848. The premises in controversy are embraced in the land so possessed and claimed by said Lownsdale. Prior to said March 30, 1849, said Lownsdale, or his grantor, had laid off a town called Portland, on said land, so possessed and claimed by him, of sixteen or more blocks, numbered consecutively from one to sixteen, or more, said blocks being sub-divided into lots of fifty feet by one hundred feet; among which blocks and lots were said block 13, and the lots in question; and he had been engaged in the business of selling town lots, so laid off, and deriving profit therefrom. On the said March 30, 1849, said Lownsdale executed and delivered to Stephen Coffin an instrument in writing, of which a copy is annexed to the cross-bill, and designated "Exhibit A."—said instrument purporting to bargain, remise and release to said Coffin, the said Portland Land Claim of six hundred and forty acres, in possession of said Lownsdale as aforesaid, with an

1871.]

Opinion of the Court—Sawyer, J.

exception of certain lots and blocks therein enumerated, reserved and excepted, as having been previously sold, to different persons, as town property. On the same day, at the same time, and as a part of one and the same transaction, the said Lownsdale and Coffin mutually executed and delivered another instrument in writing, a copy of which is annexed to said cross-bill, and therein designated, as “Exhibit B,” which is as follows:

“This article of agreement made and entered into between Stephen Coffin, of Oregon City, of the Territory of Oregon, of the first part, and Daniel H. Lownsdale, of the other part. Witnesseth: that the said Stephen Coffin, for and in the consideration of the sum of three thousand dollars paid to him by the said Daniel H. Lownsdale, in good and lawful money, agrees to make exertion to obtain a title from the United States to six hundred and forty acres of land, where the town of Portland is situated, in Tuality County, and to divide the proceeds of any sales of lots or other property or privileges now in and to the said land claim and town property, or may hereafter be attached thereto, and to bear half the expenses of any improvements they may jointly agree to make on said claim, and in every lawful exertion to further the interest of the said town site, and the said Daniel H. Lownsdale hereby agrees to furnish his half of any moneys necessary to secure the title from the United States, and use his exertions to further the said town property, by every lawful exertion personally, whenever it is in his power so to do, by assistance in the transaction of business when present, or in other countries, and pay one half the expenses of any improvements the said Stephen Coffin and said Daniel H. Lownsdale shall jointly agree to make on the claim as sold by Daniel H. Lownsdale to Stephen Coffin; it is also jointly agreed that all the profits and all the losses, all the rents and all the proceeds from sales shall be divided equally by the said parties, as long as these articles shall be in force, which shall be until dissolved by mutual consent. At which time of dissolution of these articles, the said Stephen Coffin hereby agrees to execute to the said Daniel H. Lownsdale,

Opinion of the Court—Sawyer, J.[May

a good title to the one half of the beforenamed claim of land and all the improvements thereon, in accordance to the title he now may or then may have obtained, to hold said land and town site purchased this day from said Lownsdale. The parties further agree that they will, at the close of every month, make settlement on all business, and proceed to divide the profits and losses as before said, and each of the parties agrees to act as agent, and keep a record of their proceedings and exhibit them, as above described, at their quarterly settlements."

On June 8, 1859, said Coffin, being about to be absent from Portland for a time, in San Francisco, executed in due form, and delivered to said Lownsdale, an instrument in writing, a copy of which is annexed to said cross-bill and designated as "Exhibit C." Said "Exhibit C" is a power of attorney, under seal, by which said Lownsdale, as the attorney in fact of said Coffin, is empowered to "sell on time any personal or real property whatever," and generally to transact all manner of business for said Coffin. On June 18, 1849, by virtue of this power of attorney, said Lownsdale, in the name of said Coffin, executed and delivered to John J. Marshall an instrument in writing, of which a copy is annexed to said cross-bill, and designated as "Exhibit D." Said instrument is a deed of conveyance by which the said Coffin, by said Lownsdale, his attorney in fact, in consideration of the sum of six hundred dollars, the receipt of which is acknowledged, "bargained, sold and quit-claimed unto said J. J. Marshall, his heirs and assigns forever, all those lots or parcels of land, including an entire block containing eight lots, lying and being in the town of Portland, known on the plat of said town as block No. 13," etc., being the block mentioned in the bill and cross-bill by that number; and it contains the covenant that, "I will forever warrant and defend the same against all other persons claiming the same through or by me or my heirs whatsoever." Shortly after the date of the last mentioned instrument, said Marshall, at San Francisco in California, for a valuable consideration, sold the south half of the said block No. 13, embracing lots 3, 4, 5, and 6, in said block, to D. B. Fowler, and the north

1871.]

Opinion of the Court—Sawyer, J.

half, embracing lots 1, 2, 7 and 8, he resold to said Stephen Coffin, for which he received the purchase money.

As the said deed from Coffin to Marshall had not been recorded, the said deed was redelivered by said Marshall to said Coffin, with intent to re-vest the title in him, and with the understanding that said Coffin should deed the said south half of block 13 to the said Fowler, in pursuance of said sale; and thereupon, on November 10, 1849, said Coffin, in pursuance of said agreement, by deed duly executed and delivered, directly conveyed lots 3, 4, 5, and 6 to said Fowler. A copy of said deed is annexed to said cross-bill, and designated as "Exhibit E." Said Coffin in said deed covenants to warrant and defend said premises against all and every person, or persons, whomsoever, claiming title by, through, or under said Coffin, or his heirs. Afterwards, on January 14, 1854, said Fowler conveyed said lots 5 and 6 to said Davenport, complainant in the cross-bill, by deed, a copy of which is annexed to said cross-bill and designated "Exhibit K." On December 13, 1849, said D. H. Lownsdale, Stephen Coffin and W. W. Chapman entered into an agreement, or contract, in writing under seal, a copy of which contract is annexed to said cross-bill, and designated "Exhibit L." Said contract recites that, "said Lownsdale and Coffin are joint owners of the town of Portland, and the claim upon which said town is situated," and provides that, "The said Coffin, Lownsdale and Chapman are to be equal partners in the above described property, excepting town lots already sold previous to this date, as town property;" also as follows: "In all matters pertaining to the partnership, the legal advice and counsel is to be free of charge on the part of said Chapman. A book and plat of said town shall be kept at Portland by the parties, and regular entries made in said book of sales, receipts, and expenditures. The parties shall make mutual arrangements, from time to time, for the proper use of the funds of the firm. The parties shall take such steps for obtaining title from the Government as they may mutually agree upon."

Afterwards, on January 18, 1851, said Coffin duly executed and delivered, to one Mills, a deed of conveyance, a

Opinion of the Court—Sawyer, J.

[May,

copy of which is annexed to said cross-bill and designated "Exhibit H," by which deed he "doth grant, bargain, sell, release and confirm unto the party of the second part (Mills), his heirs and assigns, lot 2, in said block 13, to have and to hold the said lot, to said Mills, his heirs and assigns forever," and he therein covenants to warrant and defend the property against the claims of all persons the United States excepted, and that if he obtains title of the United States, to convey the same to the party of the second part, by deed of general warranty. On May 15, 1851, said Coffin executed and delivered to one Cheeny, a deed of conveyance, a copy of which is annexed to the cross-bill, and designated "Exhibit F," by which he conveys lot 7, in said block 13, to said Cheeny, in the same form and with the same covenants as found in said deed to Mills. By proper mesne conveyances, copies of which are annexed to the said cross-bill, all the title to said lot 7, and rights derived by said Cheeny under said deed, became vested in said Davenport, October 7, 1856; and all the title to said lot 2, and all the rights derived by said Mills, became vested in said Davenport, January 2, 1857.

On March 10, 1852, said Lownsdale, Coffin and Chapman entered into a further contract, or agreement in writing under seal, a copy of which is annexed to said cross-bill, and designated "Exhibit M," in which, after reciting that the said parties have heretofore, up to the date of these presents, been joint proprietary claimants of the tract of land, etc., "being the same tract which the said Lownsdale originally purchased of Francis W. Pettigrove, and upon which a part of the city of Portland is laid out;"—that "said Lownsdale, Coffin and Chapman have sold lots in said city of Portland to each other, and to third persons, obliging themselves to make to the grantee, or grantees, a deed of general warranty whenever the grantor shall obtain a patent from the Government of the United States for the same;"—that it has become necessary, in order to comply with the donation law, that "the said parties shall designate before the Surveyor-General of Oregon the particular portion or part of said Portland tract, which each, by agree-

1871.]

Opinion of the Court—Sawyer, J.

ment with the others, respectively claims, in order that he may obtain a patent therefor from the Government of the United States," etc.—the said parties each covenants with each of the others; their heirs, etc.

"1st. That he will fulfill and perform all contracts and agreements which he has heretofore entered into with the others, or either of them, or with other persons, respecting the said tract of land or any part thereof.

"2d. That he will never abandon or remove from the claim which he, simultaneously with the signing and sealing hereof, shall make before said Surveyor-General, to a portion of the said Portland tract, until he shall obtain a patent therefor from the Government of the United States, that is to say:

"3d. That he will use all due diligence to procure a patent for the same, and that to this end he will in all respects fulfill and perform the requisites of the law upon this subject; and

"4th. That when a patent shall be so obtained, he will make good and sufficient deeds of general warranty for all lots, or parts of lots, in the part or tract so patented to him, which may heretofore have been sold or agreed by said parties jointly, or any of them separately, to be sold; that said deed, of course, in all cases to be made to the original grantee, his heirs, executors, administrators or assigns, grantee or grantees, as the case may be.

They then, for the faithful performance of the covenants, "bind themselves, each unto the other, in the penal sum of three hundred thousand dollars, as fixed and settled damages to be paid by the party failing to the party or parties injured," etc.

On the next day after the execution of said instrument, to wit: March 11, 1852, said Lownsdale filed his notification with the Surveyor-General, by which he designated the particular portion of said tract which he claimed to enter under said agreement, and in pursuance of such designation and claim, the proper certificate from the land office was issued to him, October 17, 1860, and thereupon a patent of the United States duly issued to said Lownsdale, June 15, 1865,

under and in pursuance of the provisions of said Act of Congress before mentioned, commonly called the "Donation Act." Said notification, certificate and patent embraced said block 13. On the same day said Chapman, and on a subsequent day said Coffin, duly filed their said notifications. Said Lownsdale's claim of settlement dated from September 22, 1848, and, from that date, for a period of four years, the said Lownsdale, either alone or in connection with said Coffin and Chapman, or one of them, occupied and improved portions of the land embraced in said general claim. The said Lownsdale, before the said conveyance to and agreement with said Coffin, and said Lownsdale and Coffin, from the date of said conveyance and agreement to the date of said further agreement by which said Chapman became a party in interest, and, from the date of said last agreement to the date of said agreement of March 10, 1852, the said Lownsdale, Coffin and Chapman, from time to time, sold numerous town lots to each other, and to various other parties, who settled upon and occupied the same, as town property, building up a town thereon, the said purchasers having no title other than such as derived from said Lownsdale, Coffin and Chapman, or some one or more of them. The population of the town of Portland in 1849 had become from 200 to 400 souls.

Said Davenport, after his said purchases, went into possession of said lots in controversy, claiming title under said conveyances, and said Davenport and his grantors made valuable improvements thereon, with the knowledge of said Lownsdale, and without any objection or suggestion of any want of title on his part. Said improvements were of the value of several thousand dollars. Said Davenport has ever since been in the possession of said lots down to the date of the filing of the bill of complaint in this action. Said Lownsdale, down to the date of his death, although aware of said occupancy, and the making of said improvements on said lots, and although his attention was called to the condition of the title by said Davenport, set up no claim to said lots adverse to said Davenport. Said Lownsdale, after said sale to said Marshall and said Fowler, as aforesaid, and

1871.]

Opinion of the Court—Sawyer, J.

before the patent issued to said Lownsdale, repurchased of said Fowler, for a valuable consideration, lots 3 and 4, in said block 13.

The decision of this action, I am satisfied, must turn upon the validity, construction and effect of the said various contracts and conveyances, copies of which are annexed to the cross-bill; and these must be construed in the light of the condition of things existing at the time, and with reference to which they were executed.

It is a matter of public history, of which the Court can take notice, that Oregon was settled while the sovereignty of the country was still in dispute between the United States and Great Britain; that, subsequently, a provisional Government was organized and put in operation by the people, without any authority of the sovereign powers; that laws were passed temporarily regulating and protecting land claims made upon public lands; and that, afterwards, a Territorial Government was established under the authority of Congress, and put in operation long before there was any law, or means by which the real title to any portion of land in Oregon could be obtained. The title to the lands in Oregon was vested in the United States, from the moment that the right of sovereignty was acquired, and the first law that was passed, by which the title in fee could in any way be acquired from the Government, was the said act of September 27, 1850, called the "Donation Act." Long before that time, however, an organized community had existed; lands had been taken up and improved; towns laid out, established and built up, having a considerable population, and a growing commerce. It was necessary, in the nature of things, that some right of property should be recognized in lands, in the dealings of the people among themselves, and laws were adopted by the provisional Government regulating the subject. Tracts of land were taken up and claimed by the locator within the limits, as to quantity, allowed; towns laid off, and lands and town lots sold and conveyed from one to another, in all respects, as though the parties owned the fee, except that every party dealing with the lands, necessarily, knew that he did not, and could

not, under the existing laws, obtain the fee from the real proprietor. But it was, also, a matter of public history, of which everybody is presumed to be cognizant, that the condition of Oregon was, to a great extent, but the repetition of a condition of things that had existed in the first settlement of nearly all of the new States, and that, in those older new States, Congress had, ultimately, made provision for recognizing the meritorious claims of the pioneers, who had settled up the country, planted the institutions of civilization, developed its resources, and thereby contributed to advance the interests of the nation; and had made provision by which their equities were protected, and the first right to purchase given to the first appropriator. It was believed that some similar provision would, also, in due time, be made in respect to lands in Oregon; and that those in possession would be preferred in the final acquisition of the title. That such expectations were entertained was, also, a matter of public history, and in view of such expected legislation towns were laid out, sold in lots, and occupied, and thus cities grew up on the public lands, without a shadow of title in the possessor, as against the United States, and without any existing law by which the title could be acquired. (*Marlin v. T'Vault*, 1 Oregon R. 78; *Lownsdale v. City of Portland*, 1 Oregon R. 390; S. C. 1 Deady; *Sparrow v. Strong*, 3 Wal. 104.)

But between man and man, possession is evidence of title in fee, as against everybody but the true owner. The law protects, in his possession, the party who has once possessed himself of, and appropriated to his own use, a piece of unoccupied land, until he has lost his possession, and right of possession, by abandonment, as against everybody but the true owner, or one deriving title from the true owner. Such possession, and right of possession, are recognized as property by the common law, and the right is protected and enforced by the Courts. A mere adverse possession, when the true owner is a private individual, may, by time, under the common law, and under the provisions of statutes of limitations, ripen into a perfect and indefeasible title. (*Arrington v. Liscom*, 34 Cal. 381, *Can-*

1871.]

Opinion of the Court—Sawyer, J.

non v. Stockmon, 36 Cal. 540; *Leffingwell v. Warren*, 2 Black 605; 2 Bl. Com. 196.) Prior appropriation is the origin of all title. (2 Bl. Com. Chap. 1.) Prior discovery, and an actual or constructive appropriation, is the origin of titles, even in Governments themselves. For communities situate like that in the early settlement of Oregon, no rule could be adopted that would better subserve the public interests, than to treat prior occupancy as giving a provisional title to lands, in reasonable quantities, and under proper restrictions, and, thereafter, until the real title can be obtained from the Government, deal with it as between individuals, in all respects as if the prior occupancy originated and vested a title in fee. This is the natural order of things, and it affords a rule of conduct consonant with the ordinary course of dealings, and the common experience of mankind in organized communities. Starting with this idea accepted as a basis of a rule of property, we have a well known system of laws applicable to the case, adequate to all the exigencies of an organized society, while with any other principle, as a basis of action, we are at sea, and a system must be developed anew. It has generally been the practice, in the new Territories, to act upon this idea, and the rights acquired in pursuance of such action, have been recognized and protected by the Courts, and acquiesced in by the Government. Among others, the cases of *The People v. Shearer*, 30 Cal. 657; *Moon v. Rollins*, 36 Cal. 333; *Bush v. Marshall*, 6 How. 288; *Thredgill v. Pintard*, 12 How. 24, 37-8; *Sparrow v. Strong*, 3 Wal. 104, and the cases therein cited, afford illustrations of such recognitions.

It was in view of such a condition of affairs existing in Oregon, as above indicated, that the Portland Land Claim was taken up, in accordance with the practice of the country at the time, regulated in many particulars by the legislation of the provisional Governments, laid out into a town, and to a considerable extent sold out in lots, many of which were actually occupied by the purchasers for residences, business, and other purposes. The party taking possession of the land, and occupying it, acquired thereby a right of property in the possession, as against everybody but the

Opinion of the Court—Sawyer, J.

[May,

United States—the true owner. This right could be transferred to another, by sale and conveyance, like any other right of property. Such a right has been recognized by the law, and the Courts, in all the new States. The California Reports, for instance, are full of cases recognizing and protecting such rights of property, and upholding their transmission from one to another by conveyance, devise and inheritance. Probably a majority of all actions brought in her Courts for the recovery of lands, for many years, rested upon a mere possession, as the origin of the title relied on. It was in view of such a state of things, that the instruments in question were executed, and in their light the writings themselves, and the acts of the parties thereto, in connection with the subject matter, must be interpreted.

Recurring to the facts before set out, we find that, on March 30, 1849, Lownsdale was in possession of the Portland Land Claim of six hundred and forty acres in extent, except certain lots which had already been sold. He had all the title that could, at that time, be acquired by a citizen under any law then existing. A portion of the claim had been laid out into town lots, some of which Lownsdale had sold. On that day, the two instruments, of which exhibits "A" and "B" are copies, were executed between Lownsdale and Coffin. These two instruments are, evidently, a part of one and the same transaction, and should be construed together, as though they were embraced in one instrument. Thus construed, they show that a partnership was contemplated between the two parties, to hold the said land claim, and sell it out in town lots, for the equal benefit of both. The legal title to this possession, under the contract, was vested in Coffin, but to be held in trust for the joint benefit of the two. They both covenant to make every exertion to acquire the true title from the United States, each to pay half the expenses of obtaining title, of improvements to be made, etc.; to sell lots and divide profits, until the partnership should be dissolved by mutual consent; and upon such dissolution Coffin was to convey one half to Lownsdale, according to the title they may then have. This con-

1871.]

Opinion of the Court—Sawyer, J.

stitutes a partnership between them, by all the tests by which that relation is usually determined. This is the relation, according to their own interpretation, put upon the instrument, when they executed the subsequent agreement by which Chapman is taken into the firm, and this is their legal relation, as clearly manifested by the instruments themselves.

It will be observed, that in conveying the legal title to the possession to Coffin, the lots before sold were excepted from the conveyance, showing that it was not contemplated that the parties to the contract should be regarded as having any beneficial interest in those lots which had "been sold to different persons, previously to this contract, as town property, to the different persons holding the same." Yet, when we come to the accompanying agreement, in which the object of the conveyance is set forth, the covenant is, to make "every exertion to obtain a title from the United States to six hundred and forty acres of land, where the town of Portland is situated;" that is to say, the whole tract, including the lots sold. There is no exception in this part of the agreement. In the agreement by which Chapman is admitted into the partnership, it is recited that Lownsdale and Coffin are joint owners of the town of Portland, and the claim upon which said town is situated, the said claim being recorded and held in the name of said Lownsdale. Then, after conveying an "undivided one third part of said claim, town lots and improvements," it provides, that, "The said Coffin, Lownsdale and Chapman are to be equal partners in the above described property, excepting town lots already sold previous to this date as town property." They, also, agree that "The parties shall take such steps for obtaining title from the Government, as they may mutually agree upon." So again, in the further agreement of March 10, 1852, the same parties recite, that they "have heretofore, and up to the date of these presents, been joint proprietary claimants of the tract of land, etc., being the same tract which Lownsdale originally purchased of Francis W. Pettigrove, and upon which a part of the city of Portland is laid out;" that said Lownsdale,

Opinion of the Court—Sawyer, J.

[May,

Coffin and Chapman “have sold lots in said city of Portland to each other, and to third persons, obliging themselves to make to the grantee, or grantees, a deed of general warranty whenever the grantor shall obtain a patent from the general Government of the United States for the same,” etc., and then enter into the several covenants before set out in this opinion, the fourth of which is: “That when a patent shall be so obtained, he will make good and sufficient deed of general warranty for all lots or parts of lots in the part or tract so patented to him, which may heretofore have been sold or agreed by the said parties jointly, or any of them separately, to be sold; that said deed, of course, in all cases to be made to the original grantee, his heirs, executors, administrators or assigns, grantee or grantees, as the case may be.”

These instruments are all executed by the same parties, and relate to the same subject matter. They are *in pari materia*, and read in connection with each other, and in the light of the surrounding circumstances, it seems clear that it was the understanding of these parties, at all times, that they were to procure title from the Government to the whole tract, as soon as it could be obtained, but that they were to have no interest, in their own right, in such lots as they, from time to time, sold in pursuance of the original plan of establishing a town. Whenever, in any of these writings, a new party is let in, all lots previously sold are excepted and reserved from the operation of the deeds conveying the interest to the new party, but when they come to the covenants to procure title, the entire claim is evidently indicated, without such exceptions, or reservations. It was evidently contemplated that, as to the lots sold, title should be acquired, but for the benefit of the vendees, not of the vendors.

It is difficult to critically read these several instruments and reach any other conclusion. Accordingly, when they came to the last covenant in the final agreement, express provision was made for carrying out this intention and understanding. If the intent was not clearly expressed before, it is distinctly brought out now. Each party cov-

1871.]

Opinion of the Court—Sawyer, J.

enants in clear and express terms, that, “When a patent shall be obtained, he will make a sufficient deed of general warranty for *all lots and parts of lots*, in the part of tract so patented to him, which may heretofore have been sold or agreed by said parties *jointly*, or *any of them separately* to be sold;” and that said deed is “to be made to the original grantee, his heirs, executors, administrators or assigns, grantee or grantees, as the case may be.” The covenant is not limited to cases where the parties had bound themselves to make their grantees a title by general warranty, when the patent should be obtained, but it extends to every sale made, whether by the parties *jointly*, or “*any of them separately*,” and without regard to the time when it was made, whether before, or after Coffin and Chapman respectively purchased.

It is true, that in the preamble reciting the inducements, in part, to the contract, it is only mentioned that the parties “have sold lots in said city of Portland to each other, and to third persons, obliging themselves to make to the grantee, or grantees, a deed of general warranty, whenever the grantor shall obtain a patent from the Government;” but the intent must be gathered from the whole instrument, and, from such examination, I am satisfied that the covenant was intended to cover, as it clearly does in terms cover, the sales under which Davenport claims, whether the sale from Coffin to Marshall, which must, also, be regarded as the sale of Lownsdale, or the subsequent sales from Coffin to Fowler, Mills and Cheeny. All are clearly within the express terms of the covenant, for all of them were sales made by some one or more of the parties to that instrument. The preamble does not recite, or profess to recite, all the objects in other particulars covered by the subsequent covenants. Besides, this covenant to convey to prior grantees all lots that had been previously sold, was, manifestly, made for the benefit of the vendees of the said parties under the various sales that had been made, and not for the benefit of either of said parties personally, as vendors. There was no need of the covenant for self-protection against any sale or conveyance recited. At all events, there is nothing in the

Opinion of the Court—Sawyer, J.

[May,

covenant, or even in the recital, to indicate a contrary purpose, or any purpose, with respect to those sales other than to act in good faith towards such vendees. There is nothing to indicate that the parties to the covenant sought thereby to obtain any further pecuniary benefit for themselves, or to relieve themselves from any pecuniary obligations or liabilities. The only obligations recited to have been assumed is, "obligating themselves to make to the grantee, or grantees, a deed of general warranty whenever *the grantor* shall obtain a patent from the Government." Now this covenant, so recited, did not impose any obligation to obtain a patent, or to make the deed if the grantor, himself, did not obtain a patent. It imposed no obligations on either of them to make "deeds of general warranty," to lands before sold by him, which should happen to fall within the tract patented to either of the others. As, for instance, it would impose no obligation on Coffin to make such deed to his prior grantees of land, which should finally be patented to Lownsdale or Chapman, for such lands having never been patented to him, the grantor, are not within his covenant. Hence, there would be no occasion to secure such conveyances from Lownsdale or Chapman for lots patented to them, as a means of relieving Coffin from liability on such covenants. The conveyance from Lownsdale or Chapman, to Coffin's former vendees, of lots finally patented to them, therefore, could in no way benefit him under such covenants as that recited. As to the land patented to Lownsdale, or Chapman, such covenants in prior conveyances of Coffin would have nothing upon which to operate. This fourth covenant in the agreement of March 10, 1852, then, must necessarily have been for the benefit of the prior vendees of the respective parties, and not of the parties themselves, who could, with respect to such lots, in no event, derive any benefit under it. The object must, necessarily, have been to fulfill the understanding to be derived from the previous agreements, and more fully developed in the last, that the title should be acquired for the benefit of the vendees of the claimants, so far as lots had been previously sold; or if not, at least, to give the impression to such vendees that

1871.]

Opinion of the Court—Sawyer, J.

they would obtain conveyances from the patentees, and so disarm opposition to their efforts to procure patents. No other reasonable conclusion is suggested by the language of the covenant, or by the circumstances, in view of which the agreement was made. The former is the honest and most reasonable construction, and is, therefore, to be adopted, rather than the latter, which would be fraudulent, and fraud is not to be presumed. It seems clear that the sales of the lots in question are not only, in fact, embraced within the terms of said fourth covenant, but, also, that it must have been so intended by the parties. The same equities existed in favor of these sales as of any others, and there was no greater occasion for the covenant as a protection to the prior grantors against liabilities with respect to the latter, than with respect to the former, and no apparent reason for making any distinction between these different classes of sales. They had sold, and received the full consideration in both cases.

It having been determined that the fourth covenant is for the benefit of the prior vendees, or grantees, of the parties, either jointly or of any of them separately, and not of the parties themselves, merely, and that the lots in question are within the said fourth covenant, the next question is, whether the beneficiaries, under the covenant, can enforce the contemplated trust in their own names, in a Court of Equity? The question is not, whether a covenant to create a trust in favor of a third party, who is a mere volunteer, *while it still remains in covenant*, can be enforced by a decree for a specific performance, as has been argued. Had the complainant in the cross-bill sought to compel Lownsdale to acquire the title to the land from the United States, in order that the trust might vest, the question would have been different. But this is not the case. Lownsdale voluntarily performed that part of the covenant to acquire the title. That covenant became executed. The title was acquired by him in pursuance of the covenant, and the trust vested with the title so acquired. It no longer rested in covenant. The title was acquired in pursuance of the covenant, and, therefore, for the benefit of the parties

Opinion of the Court—Sawyer, J.

[May,

designated by the covenant. This distinction is clearly stated in the leading case of *Ellison v. Ellison*, 1 White & Tud. Lead. Cas. in Equity, 223, and cases cited in the notes.

Besides, the vendees of these parties are not, in my judgment, mere volunteers, without consideration, or meritorious claims, within the rule, as laid down in all that class of cases where it is held that the beneficiary cannot enforce the trust, while it rests in covenant, when not a party to the agreement. It will not be denied that, as to the parties themselves, Lownsdale, Coffin and Chapman, there was a meritorious and valuable consideration passed between them in their mutual covenants. Upon that point there can be no question. I also think that there was a meritorious consideration sufficient to support a trust, as between them and their prior vendees, in the relation in which they stood to them with respect to the lots sold. They had sold all they could possibly sell at the time, and only failed to grant more, because they had no more, and were unable to obtain any more to grant, and they received the full consideration. They dealt in view of the surrounding difficulties, arising from an inability to procure the title. They sold to their vendees their possession and present right of possession, which was an absolute right of possession, as against all the world except the true owner, or some one standing in privity with the true owner. It cannot be presumed that this was done with a view, at the time, of afterwards acquiring the true title for themselves from under their vendees, for this would be to presume bad faith. One of the objects of the purchase, must, necessarily, have been, to be in a position to be entitled to the favorable consideration of the Government, when it should consent to part with the title. Prior appropriation and possession had been the basis of all prior pre-emption laws, and from the nature of the case, it must have been supposed, at the time, that the possession would be the basis upon which the title to occupied lands in Oregon would be acquired, when Congress should come to act upon the subject; and such eventually proved to be the result. In this case, the very posses-

•

1871.]

Opinion of the Court—Sawyer, J.

sion which had been thus sold and conveyed, and for which a full consideration had been received, Lownsdale, necessarily, availed himself of, as a part of his general possession of the whole claim, to procure the title to these lots under the Act of Congress; for, by the very terms of the Act under which he derived title, he could only obtain a patent after four years' residence and cultivation, and the possession upon which he did obtain his patent dates from September 22, 1848, long before the sale to Marshall. The consideration upon which the grant was made by the Government to Lownsdale was his occupancy and improvement of the land; and that possession, and right of possession, of the land, as to these lots, had been sold to Marshall. If the possession which had been acquired by Lownsdale, afforded a meritorious consideration, as between Lownsdale and the Government, even after he had sold it, the right to that possession, purchased of Lownsdale and Coffin, and paid for by their vendees, and which was held by them at the date of the said agreement and patent, ought, also, to afford a meritorious consideration as between Lownsdale, Coffin and Chapman, and their said grantees. As to these particular lots, then, the very possession, which had been sold to Marshall, and the *right to which* was in his vendees, at the time of the execution of this agreement, and of Lownsdale's filing his notification of claim with the Surveyor-General, Lownsdale used as if still in himself, as a part of his general claim to acquire the title from the Government. For that very possession, as to those lots, so used by him, a valuable and full consideration had been received by Coffin and Lownsdale in the sale to Marshall, and it was then the property of Lownsdale, Coffin and Marshall's vendees.

When, therefore, these parties covenanted among themselves in pursuance of their general plan, as indicated by the covenants and provisions of their said several agreements, to each present a claim for a patent to a specific portion of the whole claim, embracing the lots sold, as well as those unsold, and use the possession which they had so sold, to acquire the title from the Government, and then to

Opinion of the Court – Sawyer, J.

[May,

convey the title, so acquired to the parts sold, to their respective prior vendees, they did so, not only upon a valuable consideration passing between themselves, but also upon a consideration of a meritorious and valuable character, which had already been received from such prior vendees, as to the lands covenanted to be conveyed to them, when the title should be received. The right of possession, at the time, was the property of the vendees, and that possession was, in part, at least, the very consideration upon which the Government made the grant to Lownsdale. If it afforded a sufficient consideration to support a grant between the Government and Lownsdale, it ought to be sufficient to support a trust between Lownsdale and his prior grantees of the possession, who then owned it. This, in my judgment, is a consideration which, when acted upon and made the basis of an express covenant, as in this instance, a Court of Equity ought to recognize, and will recognize; and it is sufficient to take these beneficiaries out of the category of mere volunteers, without any meritorious claim, as the terms are used in equity jurisprudence. Any other view would work a fraud, both upon the Government and the vendees of the parties to these covenants, who might reasonably rely upon them, with the expectation that they would be carried out in good faith, and thereby be prevented from contesting before the Surveyor-General, where the contest was to be made, the right of the covenantors to the land, and induced to forbear making an effort in some form to procure title in their own names. It seems probable that the various and numerous purchasers from these parties would suppose that such title would be acquired in good faith, in trust for the prior purchasers, under the covenants of the agreement in question. Equities, of a character analogous to these, have been recognized by the Supreme Court of the United States, in the cases before cited, and in others. The case, I think, is within the class where the beneficiaries may enforce the trust, in a Court of Equity, in their own names. Even at law, in the case of a simple contract, a party for whose benefit a promise is made, though not a party to the contract, can maintain an

1871.]

Opinion of the Court—Sawyer, J.

action upon the promise, in his own name. (*Morgan v. Overman Silver Mining Co.*, 37 Cal. 534, and cases therein cited; *Turk v. Ridge*, 41 N. Y. Rep. 201.) So, also, upon a covenant in a deed poll to pay money generally to a particular party mentioned, though not the party making the contract, such party could maintain an action in his own name. But in a deed *inter partes*, the beneficiary could not maintain an action at law in his own name, unless a party to the instrument. (1 Ch. Plead. 4-5, and notes.) But this distinction between simple contracts and deeds poll, and deeds *inter partes*, rests upon purely technical principles, which have no application in Courts of Equity.

In *Raccouillat v. Sansevain* (32 Cal. 377), and *Raccouillat v. Renè*, an appeal in same case, by another party (Id. 450), the action was to foreclose a mortgage in the name of parties not parties to, or mentioned in the mortgage, otherwise than generally, under the designation of all prior "legal mortgagees and incumbrancers," for whose benefit, in part, the mortgage was given to another.

The question was made as to the complainant's right to maintain the action, but not much relied on, and the action was sustained, without comment by the Court.

In this case, the patentee, Lownsdale, gets the full benefit of his patent to all the lands embraced in it, for, in lieu of the lots before sold, he received and enjoyed their full value in the purchase money paid by his vendees.

Lord Chancellor Cottenham has well said: "It is the duty of Courts of Equity to adapt their practice and course of proceedings as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases which must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice, and to enforce rights, for which there is no other remedy." (*Taylor v. Salmon*, 4 My. and Cr. 141; *Walworth v. Holt*, 4 My. and Cr. 635.) If there is any doubt as to the right of complainant to enforce the trust, in the absence of any precedent involving precisely the same state of facts, the principle, thus forcibly stated, should resolve the doubt in his favor.

Opinion of the Court—Sawyer, J.[May,

It is further urged, that it is a rule of the common law, that no covenant to stand seized can pass a use, unless the covenantor has a seizin of the estate, at the time of entering into the contract, and, therefore, that no valid trust could arise out of the agreement in question, for the reason that, at its date, Lownsdale was not seized of the fee. If the rule was ever applicable to analogous cases, I find it has been modified by modern decisions, which, under the view I take, it will not be necessary to notice now. The rule itself was a technical one, and adopted to suit a condition of things entirely different from that which gave birth to this transaction. The case now under consideration is, in many particulars, *sui generis* and technical rules resting upon reasons that have no application to the circumstances of this case, ought not to be too rigorously applied. Besides, under the donation law, Lownsdale was seized of an estate in fee, if entitled to a patent at all, from, at least, the date of the passage of the act, if not by relation from the date of his settlement. The terms of the act are terms of present grant. The grant was liable to be defeated by a failure to perform the conditions subsequent, but it was, nevertheless, a grant *in præsentia*. (*Chapman v. School Dist. No. 1 et al.*, Deady's, R. 108; *Doll v. Meador*, 16 Cal. 295, and cases cited.)

It is next insisted that the agreement of March 10, 1852, is void, under the fourth section of the Donation Act, and consequently that no trust can arise by virtue of the covenants therein contained. The language of said section is as follows: "Provided further, that all future contracts, by any person or persons entitled to the benefit of this act, for the sale of the land to which he or they may be entitled under this act, before he or they have received a patent therefor, shall be void."

Is this a "future contract" "for the sale of the land," within the meaning of this provision? If not, then, it does not fall within the inhibitions of the act, and it cannot be void on that ground. Only such contracts as are declared void are avoided by the act. On the contrary, all contracts in relation to the subject matter of the act, not embraced

1871.]

Opinion of the Court—Sawyer, J.

in its language, are by implication, at least, recognized as valid. Congress recognized the existing condition of things. It must be presumed to have been cognizant of the fact that land had been occupied by settlers; that towns had been laid out and lots sold; that contracts had been made in numerous instances with reference to such lands; that parties were in possession under such contracts, and that there were many existing obligations and equities connected with the subject; and it legislated in view of the existing state of affairs, and only sought to lay down a rule for the future, carefully avoiding any interference with, or disturbance of, contracts, or rights, as they then stood. The twelfth section, also, distinctly carries out the same policy, by discountenancing contracts affecting lands thereafter to be settled upon, before the issuing of the patent, and by strong implication recognizing existing contracts, interests and equities. It requires that those who shall make settlements after a certain designated date—giving sufficient time for knowledge of the provisions of the act to be brought home to the distant people of Oregon—to make affidavit that the land claimed “is for their own use and cultivation; that they are not acting directly or indirectly as the agents for, or in the employment of others in making such claims, and that they have made no sale, or transfer, or any arrangement, or agreement, for any sale, transfer, or alienation of the same, or by which the said land shall enure to the benefit of any other person.”

No such requirement is made of those who had already made settlements. It was known that many of them could not make the affidavit; and the fact that express and minute provisions of the kind were carefully made for future contracts and settlements, without any such provisions respecting the past, is a recognition by strong implication of the right of the parties standing in a similar position in respect to past, and then existing transactions, to go on and complete their titles for the benefit of themselves, and those interested, according to their rights and equities, as they then stood. It seems evident that it must have been contemplated that, in many instances, the title upon possessions

Opinion of the Court--Sawyer, J.[May,

already commenced would, ultimately, be perfected for the benefit of others than those to whom the patent would, in fact, issue. It was but just that it should be so, in view of the condition of things existing at the time of the passage of the act; and the act seems to have been carefully framed upon this theory, recognizing by implication all past contracts and existing interests, but prohibiting future sales and future settlements and donations for the benefit of any party but the actual occupant. The vendees of Lownsdale, Coffin and Chapman, with respect to the present donation made by the act, were as clearly within the equities, which dictated the policy, and therefore, within the policy, even if it be conceded that they are not within the express terms of the donation law, as they were themselves. The vendees of portions of lands taken up by larger claimants, and occupying their purchases under them, were as meritorious claimants on the bounty of the Government, as were their vendors. There was no less cogent reason for recognizing the equities of such vendees of larger claimants, either in their own right, or through their vendors, than there was for recognizing the equities of the larger claimants themselves. It would, therefore, have been contrary to the general and beneficent policy of the very act itself, to have avoided existing contracts and equities.

The agreement of March 10, 1852, was, it is true, entered into after the passage of the Donation Act, but it is not, I think, a new or "future contract" for "the sale of the land." It is but the arrangement for carrying out the prior contracts of the parties to their completion, and in strict accordance with the terms of such prior contracts, adopting such changes in their relations, only, as were required by the exigencies of the Donation Act. By the contract of March 30, 1849, Lownsdale and Coffin became equally interested as owners of the unsold portion of the Portland Land Claim, and they then mutually covenanted to make every exertion to acquire the title from the United States to the whole six hundred and forty acres. By the agreement of December 13, 1849, Chapman was taken in as an equal partner, and they again mutually covenanted that "the

1871.]

Opinion of the Court—Sawyer, J.

parties shall take such steps for obtaining title from the Government as they may mutually agree upon." No law had yet been passed by which the title could be acquired, and this, in the existing state of things, is all they could provide for at the time. The specific mode could not be indicated, for it was not known what the exigencies of a law yet to be passed might require; and they could only make the general covenant, leaving the details open for future arrangement according to the occasion as it should arise. The Act of Congress was finally passed, by which it became necessary for claimants to present their claims singly, or severally, and, thereupon, in pursuance of their prior contracts, the said parties proceeded to "mutually agree" upon the "steps for obtaining title from the Government," and these are embodied in the agreement of March 10, 1852. They make no new sales or purchases, but simply provide for severing their interests, which were then joint, in the unsold portion of the claim, so that each could apply for a patent for a specific portion in his own name, and further provide that each shall continue his efforts to procure title, as they had before agreed, and when procured, convey to the others according to their respective present claims to the lots before sold to, and held by, each other; and, also, to convey to their various joint and several prior grantees, the lots already sold to, and paid for by, other parties. There was no new pecuniary consideration to be received, or new pecuniary benefit to be derived, from the arrangement. Its design was simply to provide for carrying out to the contemplated result their former contracts. And as far as this agreement provides for making conveyances to the proper parties, of all lots sold by them jointly, or any of them separately, I have no doubt that it but carried out the intention of the said several previous contracts, as the parties thereto themselves understood and interpreted them. This instrument, then, is but the mutual agreement provided for before, for procuring title for the benefit of the several parties according to their supposed equitable interests, as they existed at the time. The arrangement was a convenient mode of securing title in accordance with the

exigencies of the case, to themselves, and to each of their prior vendees, who had, in fact, already paid to them a much larger consideration for the mere possession than was ever demanded by the United States for the true title to an equal amount of public lands. Settlers were compelled from the circumstances of the case to purchase just such titles, and trust to the developments of time, and the acts of the proper authorities, to secure titles, or withdraw from all participation in the settlement and building up of towns. The very fact of the purchase of such rights of property as existed, and the occupancy of the lots purchased, and building up of a town thereby largely enhanced the value of that portion of the Portland land claim which remained unsold, and which was finally patented for the benefit of the general proprietors themselves; and good faith, common honesty and common justice required that these prior sales should be recognized in this final arrangement for carrying out the covenants of the prior contracts. It is not surprising, that a covenant for the benefit of all prior vendees of the respective parties was inserted in the agreement. Indeed it would have been a matter of just surprise if such a covenant had not been inserted. All prior vendees of the parties, under the circumstances of the case were meritorious claimants, and not mere objects of a gratuitous bounty, and they were justly provided for, as such.

This instrument, then, is not a "future contract" "for the sale of the land," within the meaning of the act, but only the further agreement prescribing the details of the proceedings for securing the title for the benefit of themselves, and of the other parties, who had already purchased and paid the full consideration, in pursuance of the covenants in the former agreements, as they themselves understood and interpreted them; and although there may have been no legal obligation resting upon the parties to insert this particular covenant, or to procure the title for their prior vendees, who should fall within lands patented to a party other than their vendor, yet it is clear that the agreement in this particular recognizes a meritorious claim, and is in strict accordance with good morals, and the natural

1871.]

Opinion of the Court—Sawyer, J.

equities of the case. The parties to the contract, when the title had been obtained, were themselves but donees of the Government. They paid no consideration to the Government, other than that of mere settlement and improvement, and the contribution thereby made to the development of the interests and material prosperity of the country. Their vendees generally, so far as they occupied and improved the lots purchased, did as much, at least, for the interest of the country, and, in addition, paid a full consideration in money to the parties themselves. They were claimants equally meritorious with their grantors, and were, at least, equally within the policy, if not, also, within the express terms of the Donation Act. The parties to this contract, therefore, were not prohibited from recognizing and giving effect to past contracts, conveyances and transactions respecting the land, according to their respective merits, and none other were provided for in this agreement. I am satisfied that it is not a future contract "for the sale of the land," within the meaning of the act.

The act should, if necessary, be liberally construed, so as to give effect to the general policy implied from and indicated by its terms of recognizing the meritorious claims of all those who had before been compelled, from the necessities of the case, to occupy and improve their possessions, at the risk of finally losing the results of their labors and expenditures. The various vendees of the parties to this instrument are, I think, meritorious claimants within the policy of the law, and not merely gratuitous beneficiaries. The agreement, in my opinion, is valid, and it was by virtue and in consequence of this agreement that Lownsdale himself was enabled to procure the title. Without it, and without the assent of his co-parties, he was not in a position to present and prove up his claim to any part of the land, and, having enjoyed the full benefit of the agreement, he ought to be held to a performance of all the obligations assumed by him under its provisions.

My conclusion is, that the matters set up in the cross-bill, and established by the evidence, are sufficient to call for the equitable interposition of this Court, and to entitle the complainant therein to the equitable relief prayed for.

Concurring opinion—Deady, J.

[May,

Let a decree be entered in pursuance of the prayer of the cross-bill, and denying the relief asked in the original bill.

DEADY, J. I concur in the conclusion reached in the opinion of the Circuit Judge.

After careful consideration, and not without some doubt and hesitation, I have become satisfied that by force of the agreement of March 10, 1852, and the subsequent action of Lownsdale, Coffin and Chapman, under and in pursuance of it, that each of them took and obtained from the United States his separate portion of the land claim in trust for the purchasers or their vendees of any lots situated therein, and before that time sold by any or all of these parties.

From the passage of the Donation Act—September 27, 1850—and prior thereto, Lownsdale, Coffin and Chapman had occupied and held this land claim in common and made sales of lots throughout the extent of it; but on March 10, 1852, by means of this agreement, and with intent to conform to the provisions of said act and obtain the benefit thereof, they partitioned the claim between them, so that each was thereafter enabled to proceed for himself and notify upon and obtain a donation of a separate parcel of the whole tract.

The Donation Act was a grant *in præsentî*. Each of these settlers—Lownsdale, Coffin and Chapman, was upon the land at the date of its passage, and from that time is deemed to have an estate in fee simple in his donation, subject only to be defeated by a failure on his part to perform the subsequent conditions of residence, cultivation and proof thereof.

This being so, it follows that at the date of this agreement either of these parties could impress a trust upon his donation in favor of any one. And even if it be considered that the settlers acquired no interest in the land until the partition and notification before the Surveyor-General, still each one having acquired his separate portion of the common claim in pursuance and partly by means of this agreement, so soon as he did so acquire it, the trust provided for in it became an executed one, and might be enforced by the beneficiary thereof, although a mere volunteer from whom no meritorious consideration moved.

1871.]

Concurring opinion—Deady, J.

But I do not think that these lot holders are shown or can be presumed in any way to have contributed to the acquisition of the land claim from the United States by the settlers. In the first place, I have serious doubts whether any one could acquire title under the Donation Act to a less quantity of the public land than the smallest legal subdivision—forty acres. It is confidently believed that no attempt was ever made to do so. The act was framed and passed to meet the condition and wants of an agricultural community already upon the land and in occupancy of it, and made no provision concerning town sites or lots as such. The only town in the territory then of sufficient importance to be known to Congress, was Oregon City, and this site was reserved for the benefit of a University, subject to the right of the purchasers of lots from the former occupant of the claim, to have the same confirmed and patented to them direct. (Donation Act, §. 11.) But admitting that one of these lots or blocks might have been claimed under the act as a donation, there is no evidence that any of the persons claiming the lots in question, in March, 1852, was personally residing upon and cultivating it, as required by the act, and from the general and well known history of the country at this period, it is safe to assume that none could be produced. To acquire a title under the Donation Act, required, as a consideration, a servitude of four years personal residence upon and cultivation of the land claimed. In March, 1852, the future value of lots in Portland was very problematical. The class of people who settle and build up new towns were on the wing. The rich gold mines lately discovered in the southern part of the State were attracting much attention and measurably depopulating Portland and the region round about. Indeed, it is doubtful if one person in ten of the lot holders of that day would have taken any lot or block in Portland as a gift, upon the conditions of continued and personal residence and cultivation required by the Donation Act.

Again, it is judicially known to the Court that, prior to the passage of the Donation Act, the title to all the lands in Oregon was in the United States, that in March, 1852, no one could have had any title to any portion of this land

Concurring opinion—Deady, J.[May,

except under that act. (*Lownsdale v. Parrish*, 21 How. 290; *Sparrow v. Strong*, 3 Wal. 103.) Therefore there can be no presumption that these lot holders had any interest in the lots except the bare possession, or were in any condition to claim them adversely or in opposition to the paramount occupation and title of the settlers. The lot holder occupied and claimed under and in subordination to the settler, and could only acquire title through him. In the great majority of instances the settler were under written obligation of some kind to make title to the lot holder when he should acquire it.

From the view taken of the matter, I do not deem it material to consider whether the deed to Marshall is the deed of Lownsdale or Coffin. Upon this point I express no opinion. For whether it be the deed of either or both, the transaction was a sale of their interest in block 13 by one of the parties to the agreement of March 10, 1852, and therefore within the terms of the trust declared and provided for in the fourth covenant of that instrument.

Neither do I consider or decide the question whether Coffin became reinvested with the right of Marshall in or to block 13 by the redelivery to him of the Marshall deed in San Francisco. Upon the hearing counsel for the respondents in the cross-bill, expressly declared that they made no question as to the sufficiency of the mesne conveyances from Marshall to Davenport, and admitted, so far as they were concerned, that the latter might be considered as having acquired all the right that Marshall ever had in the premises.

I think the agreement of March 10, 1852, a valid instrument, and not within the prohibition contained in Section 4 of the Donation Act against "all future contracts" "for the sale of the land" granted by the act. By its terms it appears to be a contract concerning the making of title to the parcels or lots of land already sold, and for aught that appears before the passage of the Donation Act. But if this were doubtful good policy, it seems to me, requires that the instrument, as between the parties to it and in favor of those intended to be benefited by it, should be so construed and upheld.

1871.]

Syllabus.

CENTRAL PACIFIC RAILROAD COMPANY v. DYER,
HURLEY ET AL.

CIRCUIT COURT, DISTRICT OF NEVADA,
AUGUST, 1871.

1. **MULTIFARIOUSNESS.**—The plaintiff, the Central Pacific Railroad Company, a corporation created under the laws of California, files a bill against a large number of persons, who are citizens of the State of Nevada, to determine the estate and interest claimed by them in land in that State over which the line of the railroad constructed by the company runs. In the bill the plaintiff avers, that on the first day of July, 1862, Congress passed an Act to aid in the construction of a railroad from the Missouri River to the Pacific Ocean, and by its provisions the plaintiff was authorized, after completing its road across the State of California, to extend its construction through the Territories of the United States eastwardly until it should connect with the road which the Union Pacific Railroad Company, a corporation created by the same Act, was authorized to construct westwardly from a designated point in the Territory of Nebraska; that, by the same Act, the right of way was granted to the plaintiff through the public lands of the United States for the construction of the road, to the extent of two hundred feet on each side of the track, with the right to take from the public lands adjacent all needed earth, stone, timber, and other materials, including all necessary ground for stations, buildings, work-shops, depots, machine-shops, switches, side-tracks, turn-tables and water stations which the plaintiff might require for the use and maintenance of the road; that under the right and authority thus conferred, the plaintiff had laid out and constructed a railroad from the city of Sacramento to the eastern line of the State of California, and from that line eastwardly in the Territory, now State of Nevada, a distance of forty-seven miles, and had expended in the construction of this portion of the road in Nevada, more than two millions of dollars; that all the lands through which it passes, were at the time of the passage of the Act of Congress, and the location of the road, public lands of the United States, and subject to the grant of the Government for the use of the railroad; that the plaintiff is in its possession, maintaining and using it in the transportation of passengers, freight and the mails of the United States; that the plaintiff has erected near the line of the road and within two hundred feet of the track on either side, at convenient places and points, divers work-shops, machine-shops, side-tracks, turn-tables, water stations and depots; and has made various excavations and taken wood, stone, earth and other material, and has used the same in the construction of the road; that the defendants claim and each of them claims to own some estate or interest in the land over which the road passes and upon which the track is laid, and in the public lands adjacent thereto, and the portions upon which the

work-shops, side-tracks, turn-tables and switches have been constructed, and the stations and depots have been established, adverse to the interest and title of the plaintiff, which estate and interest they claim, and each of the defendants claims to have acquired by purchase from the Government of the United States, subsequent to the grant to the plaintiff; and that they claim the land over which the road passes, and their estate and interest in the same, in distinct parcels or quantities; but that the particular quantities claimed by each are unknown to the plaintiff; that they threaten and intend to bring distinct actions at law, based solely upon such pretended purchases, to recover damages from the plaintiff, for alleged trespasses upon and injuries to the property, and thus to involve the plaintiff in a multitude of suits; and that the estate and interest claimed by the defendants and each of them are invalid and subordinate to the grant to the plaintiff, and the rights the grant conferred: *Held*, on demurrer, that the bill was not subject to the objection of being multifarious because it averred that the defendants claimed separate and distinct parcels, all of them being alike interested in defeating the claim of prior right to the land made by the plaintiff under the grant of the Government. The determination of the principal question involved, equally concerned all of the defendants.

2. **ACTION TO DETERMINE ADVERSE CLAIM.**—A statute of the State of Nevada declares that an “action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest.” The term “action” in that State includes not merely proceedings at law, but suits for equitable relief: *Held*, that the statute enlarges the class of cases in which the jurisdiction of equity was formerly exercised in quieting the title and possession of real property. It dispenses with the necessity of the previous establishment of the right of the plaintiff by repeated judgments in his favor in actions at law; and to that extent it confers upon the possessor of real property a new right, which enables him, without the delay of previous proceedings at law, to draw to himself all outstanding inferior claims. That right the National Courts will enforce in the same manner in which they will enforce other equitable rights of parties.
3. **RIGHT OF WAY.—STATUTE CONSTRUED.**—The grant of the right of way to the plaintiff through the public lands of the United States, made by the second section of the Act of Congress of July 1, 1862, was a present grant, operating immediately upon the passage of the act, without reservation or exception, and was subject to no conditions except those which were subsequent, or necessarily such as that the road should be constructed within the period specified, and be afterwards maintained and used for the purposes designated. All acquisitions of land over which this right of way was thus granted, made subsequent to the passage of the act, were subject to the exercise of this right.
4. **IDEM.**—The reservations and exceptions found in the third section of the above act apply only to the grants of the land therein mentioned, and do not apply to the grant of the right of way made in the second section.

1871.]

Statement of the Case.

5. *IDEM.*—The provision of the seventh section of the above act requiring the plaintiff, within two years, to designate the general route of the road as near as might be, and file a map of the same in the Department of the Interior, did not affect the grant of the right of way; it only furnished the means by which the Secretary could withdraw the lands within a specified distance of such designated route from preëmption, private entry and sale.

Before Mr. Justice FIELD, and HILLYER, District Judge.

This was a bill to quiet the title of the plaintiff to a portion of the land granted to it by Congress in the Territory, now State of Nevada, as a right of way for the construction of its railroad.

The plaintiff was incorporated by the State of California in June, 1861. On the first day of July, 1862, Congress passed an act incorporating the Union Pacific Railroad Company (12 Stats. 489), entitled "An Act to aid in the construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military, and other purposes."

The following are the second, third and seventh sections of the act:

"SEC. 2. And it is further enacted, That the right of way through the public lands be, and the same is hereby granted to said company for the construction of the said railroad and telegraph line; and the right, power and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depôts, machine-shops, switches, side-tracks, turn-tables, and water stations. The United States shall extinguish as rapidly as may be, the Indian titles to all lands falling under the operation of this act, and required for the said right of way and grants hereinafter made.

"SEC. 3. And be it further enacted, That there be, and

is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed; provided, that all mineral lands shall be excepted from operations of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

“SEC. 7. And be it further enacted, That said company shall file their assent to this act, under the seal of said company, in the Department of the Interior, within one year after the passage of this act, and shall complete said railroad and telegraph from the point of beginning, as herein provided, to the western boundary of Nevada Territory, before the first day of July, one thousand eight hundred and seventy-four; provided, that within two years after the passage of this Act, said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from preëmption, private entry, and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted, to be surveyed and set off as fast as may be necessary for the purposes herein named; provided, that in fixing the point of connection of the main trunk with the eastern

1871.]

Statement of the Case.

connections it shall be fixed at the most practicable point for the construction of the Iowa and Missouri branches, as hereinafter provided."

The ninth section authorized the plaintiff "to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions in all respects" as were contained in the Act for the construction of the Union Pacific railroad and telegraph line, and to meet and connect with said railroad and telegraph line on the eastern boundary.

The tenth section authorized the plaintiff, after completing its road across the State of California, "to continue the construction of said railroad and telegraph through the territories of the United States to the Missouri river, including the branch roads specified" in the act, upon the routes therein indicated, on the terms and conditions provided in the act in relation to the Union Pacific Railroad Company, until said roads should meet and connect, and the whole line of said railroad and branches and telegraph was completed.

On the second of July, 1864, Congress passed an act to amend the act of July 1, 1862, by increasing the grant of alternate sections made in the Act of 1862, from five to ten, and extending the limits within which the sections were to be selected to twenty miles on each side of the road, and by extending the distance from the designated route of the road within which lands were to be withdrawn from pre-emption, private entry and sale by the seventh section of the Act of 1862, from fifteen to twenty-five miles. (13 Stats. 358.)

The defendants demurred to the bill of complaint for the want of equity, and for misjoinder of defendants. The latter point was argued on the ground that the bill averred that the defendants claimed separate and distinct parcels of land under separate purchases made by them.

All other matters are sufficiently stated in the opinion.

Thomas H. Williams, for defendants.

Sunderland & Wood, for plaintiff.

MR. JUSTICE FIELD. The plaintiff, the Central Pacific Railroad Company, a corporation created under the laws of California, brings the present suit against a large number of persons, who are citizens of the State of Nevada, to determine the estate and interest claimed by them in the land over which the line of the railroad constructed by the company runs, between the boundary of Nevada and the Big Bend of Truckee River in that State.

The plaintiff was incorporated in June, 1861, for the purpose of constructing and maintaining a railroad from the city of Sacramento, in California, to the eastern line of the State, where that line crosses the Truckee river, and to form a continuous railroad connection between the navigable waters of the Sacramento river and the Missouri river, and for that purpose to construct and maintain a railroad through the then Territory, now State of Nevada, and other territories lying between California and the Missouri river.

On the first of July, 1862, Congress passed an act to aid in the construction of a railroad from the Missouri river to the Pacific Ocean, and by its provisions the plaintiff was authorized, after completing its road across the State of California, to extend its construction through the territories of the United States eastwardly until it should connect with the road which the Union Pacific Railroad Company, a corporation created by the same Act, was authorized to construct westwardly from a designated point in the Territory of Nebraska.

By this Act, the right of way was also granted the plaintiff through the public lands of the United States for the construction of the road, to the extent of two hundred feet on each side of the track, with the right to take from the public lands adjacent all needed earth, stone, timber, and other materials. The right of way included all necessary ground for stations, buildings, work-shops, depots, machine-shops, switches, side-tracks, turn-tables and water-stations which the plaintiff might require for the use and maintenance of the road.

1871.]

Opinion of the Court—Mr. Justice Field.

Under the right and authority thus conferred by the legislation of the State and of the United States, the plaintiff has not only laid out and constructed a railroad from the city of Sacramento to the eastern line of the State of California, but has extended the road through the State of Nevada and the Territory of Utah to its connection with the road of the Union Pacific Railroad Company—thus forming a completed road between the navigable waters of the Sacramento river and the Missouri river. This we know as matter of history. The bill of complaint, however, only alleges, in addition to the construction of the road across the State of California, that the plaintiff has laid out and constructed the road from the eastern line of that State where it crosses the Truckee river, eastwardly, in the State of Nevada, along that river to what is known as the “Big Bend” thereof, a distance of forty-seven miles. With respect to this position of the road in the State of Nevada, the bill avers, in substance, that the plaintiff has expended in its construction more than two millions of dollars; that all the lands through which it passes were, at the time of the passage of the Act of Congress, and the location of the road, public lands of the United States, and subject to the grant of the Government for the use of the railroad; that the plaintiff is in its possession, maintaining and using it in the transportation of passengers, freight and the mails of the United States; that the plaintiff has erected near the line of the road and within two hundred feet of the track on either side, at convenient places and points, divers workshops, machine-shops, side-tracks, and turn-tables, water stations and depots; and has made various excavations and taken wood, stone, earth and other material, and has used the same in the construction of the road; that the defendants claim, and each of them claims, to own some estate or interest in the land over which the road passes and upon which the track is laid, and in the public lands adjacent thereto, and the portions upon which the work-shops, side-tracks, turn-tables and switches have been constructed and the stations and depots have been established, adverse to the interest and title of the plaintiff, which estate and inter-

est they claim, and each of the defendants claims, to have acquired by purchase from the Government of the United States, subsequent to the grant to the plaintiff.

The bill further avers, upon information and belief, that the defendants claim the land over which the road passes, and their estate and interest in the same, in distinct parcels or quantities, but that the particular quantities claimed by each are unknown to the plaintiff; that they threaten and intend to bring distinct actions at law, based solely upon such pretended purchases, to recover damages from the plaintiff, for alleged trespasses upon and injuries to the property, and thus to involve the plaintiff in a multitude of suits.

The bill further avers that the estate and interest claimed by the defendants and each of them are invalid and subordinate to the grant to the plaintiff, and the rights the grant conferred; and concludes with a prayer that the defendants may be required to set out the estate and interest claimed; that the same may be decreed invalid and subordinate to the right and title of the plaintiff; and that the defendants may be enjoined from setting up or asserting any right, estate or interest in the said lands, and from bringing any action for damages by reason of the construction of the road and the excavations within two hundred feet of the track, and the construction of the buildings and other works of the company; and for such further and other relief as the nature of the case may require.

The suit is evidently founded upon a statute of the State of Nevada, which declares that "an action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest." (Act of March 8th, 1869, regulating proceedings in civil cases. Section 256.) The term "action" in that State includes not merely proceedings at law, but suits for equitable relief. It is for relief of that character that the present bill is filed.

The bill is in substance a bill of peace—its object being to quiet the title of the plaintiff, and to prevent harassing

1871]

Opinion of the Court—Mr. Justice Field.

and expensive litigation from a multiplicity of suits. The jurisdiction of equity to afford relief in such cases is undoubted. The statute, it is true, enlarges the classes of cases in which the jurisdiction was formerly exercised in quieting the title and possession of real property. It dispenses with the necessity of the previous establishment of the right of the plaintiff by repeated judgments in his favor in actions at law. (*Curtis v. Sutter*, 15 Cal. 259; *Stark v. Starr*, 6 Wall. 409.) To that extent it confers upon the possessor of real property a new right, one which enables him, without the delay of previous proceedings at law, to draw to himself all outstanding inferior claims. That right the National Courts will enforce in the same manner in which they will enforce other equitable rights of parties. This was held in *Clark v. Smith* (13 Peters, 203), where the bill was filed to enforce an Act of Kentucky, which authorized a person having both the title and possession of land to institute a suit against any other person setting up a claim to the property, and provided that if the plaintiff established his title, the defendant should be decreed to release his claim, and pay the costs of the complainant, unless by his answer he disclaimed all title to the premises, and offered to release to the complainant. "The State Legislature" said the Court, "have no authority to prescribe the forms and modes of proceeding in the Courts of the United States, but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceedings on the chancery side of the Federal Courts, no reason exists why it should not be pursued in the same form as it is in the State Courts; on the contrary, propriety and convenience suggest that the practice should not materially differ when titles to lands are the subjects of investigation."

The jurisdiction would therefore exist in the present case if there were only one defendant asserting an interest or estate adverse to the plaintiff, but the fact that there are numerous defendants claiming distinct and separate parcels by a similar title, and threatening distinct actions for in-

juries to their respective parcels, furnishes a further ground for entertaining the bill. A Court of Equity will always interfere to prevent a multiplicity of suits, when the rights of the parties can be fairly determined by a single proceeding. (*Crews v. Burcham*, 1 Black 352.)

The objection taken by demurrer, that the defendants are improperly joined, or more correctly speaking, that the bill is multifarious, because it is averred therein that the defendants claim separate and distinct parcels, is not well taken. The bill alleges that the rights of the plaintiff come from the Act of Congress, and that the interests claimed by defendants come from pretended subsequent purchases from the Government. The plaintiff asserts that upon the passage of the Act, the lands through which the road passes were public lands, subject to the disposal of the United States for the purposes of the railroad. The principal question therefore, involved, upon the allegations of the bill, is when did the grant to the plaintiff take effect? and its determination equally concerns all the defendants. If the grant took effect immediately, the subsequent purchases from the Government must necessarily have taken the lands held by them in subordination to the rights which it conferred. They are all in consequences alike interested in defeating any pretensions of this kind.

In *Mayor of York v. Pilkington* (1 Atk. 282) the plaintiff claimed the sole right of fishery in the river Ouse, and brought a bill to quiet the right against several riparian proprietors on the river claiming distinct rights. It was objected that the defendants ought to be considered as distinct trespassers; that there was no general right to be established against them; and that there was no privity between them and the plaintiff. But Lord Hardwick sustained the bill, observing that the question was whether the plaintiff had a general right to the sole fishery which extended to all the defendants, and that the defendants were not precluded from taking advantage of their several exemptions or distinct rights.

In *Gaines v. Chew* (2 How. 640) the bill was filed to set aside a will, and made the executors and all persons who

1871.]

Opinion of the Court—Mr. Justice Field.

had come into possession of the property of the alleged testator by purchase or otherwise, parties. The purchases were made at different times and for different parcels of the property. To the objection that there was misjoinder or multifariousness in the bill in making the defendants parties, the Court said that the main ground of defense, the validity of the will attacked and the proceedings under it was common to all; that their interests might be of greater or less extent, but that constituted a difference in degree only, and not in principle; that in every fact which went to impair or establish the authority of the executors, the defendants were alike interested, and that the bill avoided multiplicity of suits without subjecting the defendants to inconvenience or unreasonable expense. The objection was therefore overruled. In considering the subject of multifariousness, the Court cited the language of Lord Cottenham in *Campbell v. Mackay* (1 Mylne & Craig, 603), that "to lay down a rule applicable universally, or to say what constituted multifariousness as an abstract proposition, is upon the authorities utterly impossible," and observed that "every case must be governed by its own circumstances; and as these are as diversified as the names of the parties, the Court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts."

As already intimated, the real question presented by the case is, when did the right of way to the extent of two hundred feet on each side of the road, vest, under the Act of Congress, in the plaintiff? The defendants contend that the grant of the right of way was subject to the same limitation which is prescribed by the Act to grants of the alternate sections, namely, that the land designated was not reserved or otherwise disposed of by the United States, or that a preëmption or homestead claim had not attached to it at the time the line of the road was definitely fixed; and hence

it is argued that the bill, in averring that the defendants' claim, by purchases made from the Government subsequent to the passage of the Act of Congress, does not negative all possible right in them, as they may still have acquired their interests before the definite location of the road.

The construction for which the defendants thus contend is clearly incorrect. The grant of the right of way is a present grant, operating immediately upon the passage of the Act, without reservation or exception, and is subject to no conditions except those which are subsequent, or necessarily implied, such as that the road shall be constructed within the period specified, and be afterward maintained and used for the purposes designated. All acquisitions of land over which this right of way was thus granted, made subsequent to the passage of the Act, were necessarily subject to the exercise of this right. The reservations and exceptions found in the third section, apply only to the grants of land therein mentioned, and do not apply to the grant of the right of way made in the second section.

The provision of the seventh section requiring the plaintiff, within two years, to designate the general route of the road as near as might be, and file a map of the same in the Department of the Interior, in no respect affected the grant of the right of way; it only furnished the means by which the Secretary could withdraw the lands within a specified distance of such designated route from preëmption, private entry and sale.

It follows that the objection to the bill founded upon this construction of the Act falls to the ground.

The demurrer must, therefore, be overruled, and the defendants be required to answer the bill by the rule-day in November next.

Ordered accordingly.

1871.]

Syllabus.

JOHN B. MONTGOMERY v. THOMAS P. BEVANS *et al.*

CIRCUIT COURT, DISTRICT OF CALIFORNIA,
AUGUST 26, 1871.

1. **ALCALDE GRANTS.**--An Alcalde of the Pueblo of San Francisco, in 1846, had no authority to revoke a grant once made by him and delivered, or to mutilate its record. A mutilation of a record by him did not operate to divest a title already passed to the grantee.
2. **ABSENCE.—PRESUMPTION OF DEATH.**—When a party has been absent seven years without being heard of, the presumption of law then arises that he is dead. But when a party is once shown to be alive, the presumption of law is that he continues alive until his death is proved, or the rule of law applies by which such death is presumed to have occurred, that is, at the end of seven years. This presumption of life is received in the absence of any countervailing testimony, as conclusive of the fact establishing it for the purpose of determining the rights of parties as fully as the most positive proof. The only exception to the operation of this presumption is when it conflicts with the presumption of innocence, in which case the latter prevails.
3. **LIFE PRESUMPTIONS.**—The presumption of the continuance of life rebutted in this case by evidence tending to show that the absent party met his death soon after his disappearance.
4. **GRANT TO PARTY DECEASED.**—A grant of land in the Pueblo of San Francisco, by an Alcalde in 1846 to a person deceased, was void.
5. **SAN FRANCISCO TITLE TO PUEBLO LANDS.**—The city of San Francisco presented her claim for confirmation to the Board of Land Commissioners created under the act of Congress of March 3, 1851; the Board confirmed the claim to a portion of the land, and rejected it for the balance; an appeal was taken by the city from this decision to the District Court of the United States; the case was then transferred to the Circuit Court of the United States for the district of California; and by that Court a decree was rendered May 18, 1865, confirming the claim of the city to four square leagues of land, subject to certain reservations and exceptions therein mentioned. From this decree an appeal was taken to the Supreme Court of the United States, and whilst the case was pending there, Congress passed the Act of March 8, 1866, "to quiet the title to certain lands within the corporate limits of the city of San Francisco," by which act all the right and title of the United States, to the land situated within the corporate limits of the city, confirmed by the decree of the Circuit Court, were relinquished and granted to the city, and the claim of the city to the land was confirmed, subject, however, to the reservations and exceptions designated in the decree, and upon certain trusts as to the disposition of the land: *Held*, 'That by this act the Government determined the conditions upon which the claim of the city should be recognized and confirmed, and that the title of the city, therefore, rests upon the decree of the Circuit Court, as modified by the Act

Syllabus.

[Aug.]

of Congress—that is, her title is that which is recognized and established by the decree as thus modified. The decree must be read precisely as if the conditions prescribed in the Act of Congress had been inserted in the decree by the Court.

6. **IDEM.—CHARACTER OF TITLE.**—The claim of the city of San Francisco, as successor of the Pueblo, to her municipal lands, was founded upon the general laws of Mexico, by which pueblos, or towns, once established and officially recognized, were entitled for their benefit, and the benefit of their inhabitants, to the use of lands embracing the site of such pueblos, or towns, and of adjoining lands within certain limits. No assignment of these lands having been made to the pueblo under the former Government, the claim or right of the city was an imperfect one, requiring recognition and confirmation in the mode prescribed by Congress, like other claims to property of an imperfect character derived from Spanish or Mexican authorities.
7. **IDEM.—GRANT UNDER ACT OF CONGRESS, 1864.**—By the fifth section of the Act of Congress of July 1, 1864, “to expedite the settlement of titles to lands in the State of California,” all the right and title of the United States to the lands within the limits of the city, as defined by its charter of 1851, were granted to the city for the uses and purposes specified in the Van Ness Ordinance, subject to certain exceptions designated. These exceptions consisted of all sites or other parcels of land which had been, or were then, occupied by the United States for military, naval, or other public uses, or such other sites or parcels as might thereafter be designated by the President within one year after the rendition to the General Land Office by the Surveyor-General of an approved plat of the exterior limits of the city, as recognized by the section, in connection with the lines of the public surveys: *Held*, That the exception from the grant of such parcels as might be subsequently designated by the President, did not defeat the entire grant; and that if the exception were not void for repugnancy, the title of the United States to the lands specified must be regarded as having passed by the Act to the city with a right in the United States to resume the title to parcels upon the designation of the President within a specified period.
8. **IDEM.—VAN NESS ORDINANCE.**—The adverse interest of the Government to the lands within the corporate limits of 1851 being released by the Act of July 1, 1864, the titles conferred by the Van Ness Ordinance became perfect legal titles. The act operated upon such titles as effectually as a patent would have done, and the right reserved to the United States did not affect the perfect character of those titles.
9. **IDEM.—STATUTE OF LIMITATIONS OF 1863.**—The sixth section of the State Statute of Limitations of 1863, providing in substance that parties claiming real property under title derived from the Spanish or Mexican Governments, or the authorities thereof, which had not been finally confirmed by the United States, or its legally constituted authorities, shall be limited to five years after its passage, within which to bring an action for the recovery of the property or its possession, but if the title had been thus finally confirmed, the parties shall be subject to the same limitations as though they derived their title from any other source, that is,

1871.]

Statement of the Case.

shall have five years from such final confirmation, is invalid so far as it applies to actions for the recovery of real property founded upon titles derived from Mexican or Spanish authorities, perfected after its passage, either by Act of Congress or by judicial decree, survey and patent, and that, as to titles thus perfected, the ordinary period of limitation must be allowed from the date of their consummation, which exists with reference to actions on complete titles from other sources.

10. MEXICAN GRANTS, LEGISLATION AFFECTING.—The Act of Congress of March 3, 1851, passed in execution of the obligation of the United States, under the stipulations of the treaty by which California was ceded, to protect the holders of titles derived from Mexican or Spanish authorities, is not subject to any constitutional objection, so far as it applies to titles of an imperfect character; that is, to titles which require further action of the political department of the Government to render them perfect; and the action of the Government under this Act, and the rights of possession and enjoyment which the title perfected thereby gives, cannot be defeated or impaired by any State legislation.

Before MR. JUSTICE FIELD.

THIS was an action for the possession of a fifty-vara lot situated within the limits of the city of San Francisco, as defined by its charter of 1851; and was tried by the Court without the intervention of a jury, by stipulation of the parties. The plaintiff asserted title to the demanded premises, under an alleged grant to his son, John E. Montgomery, issued by Alcalde Washington A. Bartlett, bearing date on the first day of December, 1846. The defendants claimed under a grant issued to Andrew J. Grayson by Alcalde Edwin Bryant on the twenty-sixth day of February, 1847.

It was admitted by the parties, that San Francisco was, in 1846, a Mexican Pueblo, claiming title to four square leagues of land, embracing the tract upon which the present city of San Francisco is situated; that in December of that year, the above named Washington A. Bartlett was Alcalde or chief magistrate of that Pueblo; and that in February, 1847, Edwin Bryant was his successor as such Alcalde.

It was also admitted, that the city of San Francisco, as successor of the Pueblo, asserted a claim for the four square leagues of land, and presented her claim for the same for confirmation to the Board of Land Commissioners, created under the Act of Congress of March 3, 1851; that such proceedings were had in the prosecution of that claim, that on

Statement of the Case.

[Aug.]

the eighteenth day of May, 1865, it was confirmed by a decree of the Circuit Court of the United States for the District of California, to the extent of the four square leagues. From the decree of the Circuit Court an appeal was taken to the Supreme Court of the United States, and whilst the appeal was pending, Congress passed the Act of March 8, 1866, which is given below. The appeal was accordingly dismissed on stipulation of the Attorney-General. (*Townsend v. Greeley*, 5 Wall. 337; *Grisar v. McDowell*, 6 Id. 379.) The record of the proceedings in the case was presented in evidence and reference was made to it on the trial. No official survey of the tract confirmed by the decree of the Circuit Court has ever been approved by the Commissioner of the General Land Office, or by the Secretary of the Interior.

It was also admitted that the premises in controversy were within the limits of the city of San Francisco, as defined by its charter of 1851, and within the description of lands covered by the ordinance of the city called the Van Ness Ordinance, adopted by the Common Council and ratified by the Legislature of the State, March 11, 1858.

Grayson, the grantee of the grant from Alcalde Bryant, went into immediate possession under his grant, and either he, or parties tracing title through him, have been in the uninterrupted possession of the premises, asserting ownership of the same under the grant ever since.

The alleged grant to Montgomery was not produced, but the plaintiff, who is the father of the grantee, and whose deposition was taken under a commission in Pennsylvania, testified that a document of that character was delivered to him for his son in December, 1846. He was at the time a Captain in the Navy of the United States, in command of the sloop of war Portsmouth, lying in the harbor of San Francisco; and his statement was that the alleged grant was brought by a messenger from Alcalde Bartlett on board the Portsmouth, and delivered to him for his son, who had, about a fortnight before, sailed up the Sacramento; that the messenger brought, at the same time, three grants, one for himself, and one for each of his two sons, and delivered them all to him, the two latter to keep for his sons; and that

1871.]

Statement of the Case.

afterwards, as he was leaving the port of San Francisco, he sent the grant for John E. Montgomery on shore to the Alcade to be kept for the grantee, as he did not expect to see him there again. It was admitted that this document could not be found among the papers of Alcalde Bartlett, or among the papers he left with his successor in office, although diligent search had been made for it.

In connection with the testimony the plaintiff offered a defaced record of the alleged grant, found in the book kept by Alcalde Bartlett, in which a record was made of grant issued by him. The record was in the form of a certificate of the Alcalde over his signature, that on the first day of December, 1846, he had, by virtue of the authority vested in him, granted the lot in question to John E. Montgomery, his heirs and assigns, and had put the grantee in full and quiet possession of the same. The signature of the Alcalde is erased by lines drawn over it, but is plainly legible through the lines, and across the record the following words are written: "This title not given out in consequence of the loss of the petitioner before he could have done so. Feb. 1847. Wash. A. Bartlett, Chief Magistrate."

The following is a copy of this document, the erasures and endorsement, being as above stated:

"Lot No. One Hundred Thirteen (113), granted to John E. Montgomery. Chief Magistrate's Office, Yerba Buena.

"This is to certify that on the first (1st) day of December, A. D. 1846, I, Washn. A. Bartlett, Alcalde or Chief Magistrate of San Francisco, by virtue of the authority of my office, granted, ceded, conveyed and confirmed unto John E. Montgomery, now resident in the District, the lot No. One Hundred Thirteen in the town of Yerba Buena, said lot being fifty Spanish varas square, and gave the said John E. Montgomery, his heirs and assigns, a full and valid title to said lot No. One Hundred Thirteen (113), under the form and conditions set forth in the title and recorded in this Register, and that I put the said John E. Montgomery in full and quiet possession of said lot No. One Hundred Thirteen (113), and record the same for his security.

"WASHN. A. BARTLETT.

"Liber 'A' of Original Grants, page 201."

Statement of the Case.

[Aug.]

The testimony of experts skilled in detecting resemblances and differences in handwriting was then taken, and from that testimony as well as from an inspection of the writings, it was clear that the lines over the signature and the writing across the record, were made by the same pen and with the same ink, and hence the Court was of opinion that they were both made at the same time; that is, at the date of the latter, in February, 1847; and being also of opinion that there was no authority in the Alcalde to revoke a grant once made, or to mutilate its record, admitted the record in evidence against the objection of the defendants.

It also appeared in evidence, that, besides the *Portsmouth*, the United States sloop of war, *Warren*, was, in November, 1846, lying in the harbor of San Francisco; and about the middle of that month, a launch from the *Warren* sailed from the harbor for Sutter's Fort, a place on the river Sacramento at a distance of about one hundred and twenty miles from San Francisco. The launch was manned by ten seamen, and was commanded by William H. Montgomery, a midshipman, and sailing-master on board the *Warren*. John E. Montgomery, brother of William, accompanied the launch. Both of the Montgomerys were sons of Captain Montgomery. It was generally understood at the time, on board the *Warren*, that the launch was sent with money to pay the troops of the United States stationed at Sutter's Fort. The voyage between San Francisco and Sutter's Fort was often made at that time in a single day. An ordinary voyage by sail from San Francisco to the Fort and back did not occupy over four or five days. The launch was propelled by both sails and oars. From the time it sailed, no intelligence had ever been received of it, or of its officers, or of any of its men. About ten days after its departure, not hearing of it, Captain Montgomery became uneasy at its absence, and sent out several boats in search of it and of his sons and the men who sailed with them, and these boats were kept on the search for about two weeks. No trace was ever found of launch, officers or men, nor has ever any intelligence of its or their fate ever been received

1871.]

Statement of the Case.

since. Captain Montgomery sailed with the *Portsmouth* from the port of San Francisco on the fifth or sixth of December, 1846.

There was testimony taken as to the manner in which Alcaldes in San Francisco, in 1846 and 1847, made grants of lots in the Pueblo, but this is sufficiently shown in the opinion of the Court.

John E. Montgomery was never married, and never made any will, and by the law of California, the father takes the estate of a child dying intestate without issue.

The following is the fifth section of the Act of Congress of July 18, 1864, entitled "An Act to expedite the settlement of titles to lands in the State of California (13 Stats. 332):

"SECTION 5. *And be it further enacted, That all the right and title of the United States to lands within the corporate limits of the city of San Francisco, as defined in the Act incorporating said city, passed by the Legislature of the State of California on the fifteenth of April, one thousand eighteen hundred and fifty-one, are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an Act of the Legislature of the said State, approved on the eleventh of March, eighteen hundred and fifty-eight, entitled 'An Act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the Common Council of said city,' there being excepted from this relinquishment and grant all sites or other parcels of lands which have been, or now are, occupied by the United States for military, naval, or other public uses, or such other sites or parcels as may hereafter be designated by the President of the United States, within one year after the rendition to the General Land Office, by the Surveyor-General, of an approved plat of the exterior limits of San Francisco, as recognized in this section, in connection with the lines of the public surveys: And provided, That the relinquishment and grant by this Act shall in no manner interfere with or prejudice any bona fide claims of others, whether asserted adversely under rights*

Statement of the Case.

[Aug.]

derived from Spain, Mexico or laws of the United States, nor preclude a judicial examination and adjustment thereof."

Under the clause of this act authorizing the President to designate other sites or parcels of land besides those previously or then occupied by the United States for military, naval or other public uses, he designated on the twelfth of October, 1866, the island of Yerba Buena, or Goat island, for military uses. No other sites or parcels have ever been designated by him under the above act.

The following is the Act of Congress of March 8, 1866, entitled "An Act to quiet the title to certain lands within the corporate *limits of the city of San Francisco* (14 Stats. 4):

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That all the right and title of the United States to the land situated within the corporate limits of the city of San Francisco, in the State of California, confirmed to the city of San Francisco by the decree of the Circuit Court of the United States for the northern district of California, entered on the eighteenth day of May, one thousand eight hundred and sixty-five, be, and the same are hereby, relinquished and granted to the said city of San Francisco and its successors; and the claim of the said city to said land is hereby confirmed, subject, however, to the reservations and exceptions designated in said decree, and upon the following trusts, namely, that all the said land, not heretofore granted to said city, shall be disposed of and conveyed by said city to parties in the *bona fide* actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the Legislature of the State of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses: *Provided, however,* That the relinquishment and grant by this act shall not interfere with or prejudice any valid adverse right or claim, if such exist, to said land or any part thereof, whether derived from Spain, Mexico or the United States, or preclude a judicial examination and adjustment thereof."

1871.]

Opinion of the Court—Mr. Justice Field.

Charles T. Botts and W. W. Chipman, for plaintiffs.

Edward J. Pringle and George & Loughborough, for defendants.

MR. JUSTICE FIELD. There was no authority in the Alcalde to revoke a grant once made and delivered, or to mutilate its record. Neither an attempted revocation nor a mutilation of a record could operate to divest a title already passed to the grantee. If the grantee were living at the date of the grant, and thus capable of taking the title, a question which I shall hereafter consider at length, the power of the Alcalde over the property was exhausted when the grant was delivered; and the record of the fact was not subject to subsequent alteration by him.

It may be proper to observe here that I do not assent to the doctrine asserted by counsel, that the record in the book of the Alcalde is the grant, and that the title to the premises passed to the grantee when the signature of that officer was affixed to it. The record does not purport to be a grant of itself; it contains no words of present transfer. It only purports to declare the fact that a grant had already been made. It is undoubtedly primary evidence of that fact, but it is manifest that the Alcalde did not consider this entry as the operative instrument which passed the title, but only as record evidence of his official act. The book shows on its face, and it also appears from the testimony in the case as to the mode of procedure pursued by the Alcalde in making grants, that another document than the record was deemed essential to the transfer of the title, in other words, that the document intended for the grantee was considered as the grant.

I am aware of the decision of the Supreme Court of this State, in *Donner v. Palmer* (31 Cal. 500), and have read with much interest the very able and learned opinion of Mr. Justice Sanderson in that case; and I am not prepared to question the general soundness of the views there ex-

Opinion of the Court—Mr. Justice Field.

[Aug.]

pressed, when applied to grants made by Mexican Alcaldes acting under the laws of Mexico, and adopting the forms and modes of procedure prescribed by them. But it is a matter perfectly notorious that the Alcaldes in the Pueblo of San Francisco, appointed shortly after the conquest by the military or naval authorities having command of the district, knew little of Mexican or Spanish law, and less of the modes or procedure prescribed by them for the alienation of lands. They were informed, and this information was the substance of their learning on the subject, that Alcaldes under the Mexican law possessed authority to make grants of town lots upon petition; and they proceeded to exercise the authority without any knowledge of the limitations upon its exercise imposed by that law, and in utter disregard of its forms and modes of procedure. The power they asserted they claimed under the law of Mexico, but in its exercise they followed the mode which was in accordance with the system of conveyancing with which they were familiar. Whether the departure from the Mexican mode affected in any respect the validity of the exercise of the power, is a question which has no practical importance. The legislation of the State and of the United States has vested in the holders of these grants, within the charter limits of 1851, an indefeasable estate, whatever the imperfection which attended their previous title.

But it is important in many cases to inquire into the modes of procedure adopted by the Alcaldes in order to give the effect they intended to the record of their official acts. In the present case there was a delivery of the grant and the mutilation of the record was subsequently made. The present case is, in this respect, distinguished from the cases which have come under consideration by the Supreme Court of this State.

The testimony of the plaintiff which proves the delivery of the grant, also proves the death of the grantee, or rather proves that he has not been heard from since the fifteenth of November, 1846, and the law presumes the death of a person who has not been heard from for the period of seven

1871.]

Opinion of the Court—Mr. Justice Field.

years. The plaintiff claims the premises as the heir of the grantee, and relies upon the presumption of law as to the grantee's death to establish his case. And, at the same time, he relies upon what he insists is a presumption of law of equal force, that the grantee having been shown to be alive on the fifteenth of November, 1846, continued alive until the lapse of seven years, when the presumption of death arose. The counsel for the defendants, on the other hand, contend that there is no presumption of the continuance of life during this period of seven years, and that the plaintiff, asserting that the grantee was alive on the first day of December, 1846, as he must do to give efficacy to the grant of the Alcalde, is bound to prove the fact; and failing to do so, his claim of title falls to the ground. The argument upon which this position is based is substantially this: The presumption of death arises from the lapse of time since the party has been heard from; for it is considered extraordinary if he was alive that he should not be heard of during this period. Now, if he is to be presumed to be alive up to the last day but one of the seven years, there is nothing extraordinary in his not having been heard of on the last day, and the previous lapse of time during which he was not heard of becomes immaterial by reason of the assumption that he was living so lately. Language similar to this is found in the opinion of the Exchequer Chamber in the case of *Knight v. Nepean* (2 Mees. and Wels. 895), and hence counsel argue that there is no presumption in favor of the continuance of life during the penumbra, or death period, of seven years, for if such presumption prevailed for one day after disappearance proved, it would necessarily prevail for six years and three hundred and sixty-four days, and the whole basis upon which the presumption of death rests would become absurd. The cases of *Doe v. Nepean*, decided by the Court of King's Bench, of *Knight v. Nepean*, mentioned above, decided by the Exchequer Chamber, and the case of *In re Phene Trusts*, recently decided by the Court of Appeal in Chancery, in England, are cited in support of this position.

Opinion of the Court—Mr. Justice Field.

[Aug.]

In *Doe v. Nepean* (5 Barn. and Adolph, 86), the lessor of the plaintiff claimed the premises in controversy by title accruing on the death of one Matthew Knight, who left England for America in 1806, and was not heard of after 1807. The action was brought in 1832, and the question at the trial was whether the action was barred by the statute which limited the entry of a person into lands to twenty years after title accrued. It was admitted that Knight must be presumed to have died, more than seven years having elapsed since he was heard of, and if that presumption were referable to the time when the last intelligence was received of him, 1807, the action was brought too late; but if it arose only when seven years had elapsed from the receipt of such intelligence the action was in time. The judge before whom the case was tried was of opinion that the presumption of death only arose at the expiration of the period of seven years, or in other words the presumption of life continued until that time, and directed a verdict for the plaintiff, with leave to the defendant to move for a nonsuit. After argument upon the motion, the Court of the King's Bench held that the lessor of the plaintiff who gave no other evidence of Knight's death than his absence, failed to establish that his death took place within twenty years before the action was brought. Mr. Chief Justice Denman, in giving the opinion of the Court, observed that though absence of a person for seven years without being heard of naturally led the mind to believe he was dead at the end of that period, it raised no inference as to the exact time of his death, and still less that death took place at the end of seven years.

In the case of *Knight v. Nepean*, which was another action of ejectment, for the same premises, the same question was considered by the Exchequer Chamber (2 Mees. and Wels. 895), and after elaborate argument, the doctrine laid down in *Doe v. Nepean* was approved, the Court observing, in its opinion, that when nothing is heard of a person for seven years, it is a matter of complete uncertainty at what point of time in those seven years he died, and that of all the points of time, the last day is the most improbable and in-

A good illustration of the doctrine of presumption of death.

1871.]

Opinion of the Court—Mr. Justice Field.

consistent with the ground of presuming the fact of death. And yet, in the opinion both of the King's Bench, in *Doe v. Nepean*, and of the Exchequer Chamber, in this case, it is stated that the law presumes that a person once shown to be alive continues so until the contrary be shown, and that for this reason the onus of establishing the death of Knight rested upon the lessor of the plaintiff. The presumption of the continuance of life, thus stated, is inconsistent with the conclusions reached in both cases. If the presumption of life exists until death is shown, it is difficult to perceive why it should not continue when death is not shown, until the period is reached at which the law has fixed as the commencement of a different presumption. Clearly there is no rule or principle which can limit its continuance at any period within the seven years, if it be admitted to exist at all.

In the case of *Phene Trusts* (L. R. 5, Ch. App. 139), the Court of Appeal in chancery held, after elaborate consideration, that the time at which a person died within the seven years was not a matter of presumption, but of proof; also that there was no presumption in favor of the continuance of life after the disappearance of the party, and that the onus of proving the death of the party at any particular time within that period, lay upon the person who claimed a right resting upon the establishment of either of these facts.

In that case it appeared that one Francis Phene had died in January, 1861, having, by his will, bequeathed the residue of his estate to his nephews and nieces in equal shares. Nicholas Phene Mill was one of his nephews, and the share to which he would have been entitled, if living, was paid into Court, because it was uncertain whether he survived the testator. In 1869, letters of administration were granted to his brother, who presented a petition for the payment of the fund to him. It appeared in evidence that he left his parents' home in England, and went to America in August, 1853, and was last heard of in June, 1860. Vice-Chancellor James, to whom the petition was presented, granted its prayer, holding in deference to three previous decisions of Vice-Chancellor Kindersly and one of Vice-Chancellor

Opinion of the Court—Mr. Justice Field.

[Aug.]

Malins, that the deceased must be presumed to have survived the testator, upon the general doctrine that continuance of life once shown to exist is presumed until death is proved, or at least for a reasonable period after disappearance; but as he dissented from the decisions, he directed the fund to be retained in Court until the respondents had an opportunity to bring the matter before the Court of Appeal.

The decision of Vice-Chancellor Kindersly proceeded upon the presumption of the continuance of life for a reasonable period after the party is shown to have been in existence; but Vice-Chancellor Malins extended the presumption of the continuance of life to the expiration of the seven years. *In re Phene Trusts* (Law Rep. 4 Eq. Cases 416), the doctrine held by these Judges was overruled, and if the opinion of the Court of Appeals contains a correct exposition of the law of England, and we are bound to presume that it does in the absence of any decision of the House of Lords on the subject, that law supports the position of the counsel for the defendants in this case, that the onus rests on the plaintiff of showing that John E. Montgomery, who disappeared on the fifteenth of November, 1846, and of whom no intelligence has since been received, was alive on the first day of December, 1846, when the grant of the Alcalde was made.

But the law as thus declared in England is different from the law which obtains in this country, so far as it relates to the presumption of the continuance of life. Here, as in England, the law presumes that a person who has not been heard of for seven years is dead, but here the law, differing in this respect from the law of England, presumes that a party once shown to be alive continues alive until his death is proved, or the rule of law applies by which death is presumed to have occurred, that is, at the end of seven years. And the presumption of life is received, in the absence of any countervailing testimony, as conclusive of the fact, establishing it for the purpose of determining the rights of parties as fully as the most positive proof. The only exception to the operation of this presumption is when it con-

1871.]

Opinion of the Court—Mr. Justice Field.

flicts with the presumption of innocence, in which case the latter prevails.

This rule is much more convenient in its application, and works greater justice than the doctrine which obtains in England, according to the decision in *Phene Trusts*, that the existence of life at any particular time within the seven years, when the fact becomes material, must be affirmatively proved. In numerous cases such proof can never be made, and property must often remain undistributed, or be distributed among the contestants not according to any settled principle, but according as one or the other happens to be the moving party in Court. Take this case by way of illustration: A man goes to sea on the first of January, 1860, and is never heard of again; his father makes his will and dies on the first of July of the same year, leaving him a portion of his property, and the residue to a distant relative. If persons claiming under the missing man apply for the legacy to him, they must fail, for they cannot prove that he survived the testator. On the other hand, if the residuary legatee applies for the property on the ground that the legacy to the missing man has lapsed, he must fail, for he cannot prove that the missing man died before the testator, and the proof of his death in such case would be essential to the establishment of the applicant's right.

Nor is this rule as to the presumption of the continuance of life up to the end of the seven years, justly subject to the criticism of counsel, that it renders absurd the whole basis on which the presumption of death rests. There must be some period when the presumption of the continuance of life ceases and the presumption of death supervenes; and as in all cases where the existence of a presumption arising from the lapse of time is limited by a fixed period, it is difficult to assign any valid reason why one presumption should cease at the particular time designated, rather than at some other period, and a different presumption arise, except that it is important that some time, when the change takes place should be permanently established.

It would be difficult to assign any other reason than this for the presumption which obtains in some States, that a

Opinion of the Court—Mr. Justice Field.

[Aug.]

debt is paid, upon which no action has been brought, after the lapse of six years; and that it is unpaid up to the last hour of the sixth year. The presumption of payment arising from the lapse of time without action, it might be said with equal propriety, as in the present case with respect to the presumption of life to the end of the seventh year, that if the presumption of non-payment extends up to the end of the sixth year, it renders absurd the whole basis upon which the presumption of payment rests. So it would be difficult to give any sufficient reason for admitting in evidence a deed thirty years old without other proof of its execution than what is apparent on its face, and at the same time refusing admission to a deed except upon full proof of its execution, which has existed thirty years less one day—except that it is important that the period should be fixed at which the presumption arises which supersedes the necessity of direct proof.

But it is unnecessary to pursue the subject further. I am of opinion that the plaintiff could rely, in the first instance, upon the presumption of law as to the continuance of life to establish the fact that John E. Montgomery was alive on the first day of December, 1846, when the grant of the Alcalde was issued. This leaves the plaintiff with a *prima facie* case of recovery.

We turn now to the consideration of the affirmative positions of the defendants. They contend that the evidence in the case rebuts the presumption of the continuance of life, and warrants the inference that the alleged grantee died previous to the first of December, 1846, and that the action is barred by the Statute of Limitations.

It appears from the evidence that about the middle of November, 1846, a launch from the United States sloop-of-war, *Warren*, a vessel then lying in the harbor of San Francisco, and, with the *Portsmouth*, under the command of Captain Montgomery, sailed from the harbor with ten seamen and two officers for Sutter's Fort on the Sacramento river. The two sons of Captain Montgomery were on the launch—William H. Montgomery, a midshipman and sailing-master on the sloop, *Warren*, had the command of it;

1871.]

Opinion of the Court—Mr. Justice Field.

John E. Montgomery, who was clerk of Captain Montgomery on board the *Portsmouth*, accompanied his brother. It was understood at the time on board the *Warren* that the launch was sent with money to pay troops of the United States. Sutter's Fort is distant from the harbor of San Francisco about one hundred and twenty miles, and the voyage between the two places is often made in a single day. An ordinary voyage from San Francisco to the Fort and back would not occupy over four or five days. The launch in this case was propelled both by sail and by oars. From the time it sailed, no intelligence has ever been received of it, or of either of the officers, or of any of the men who accompanied it. About ten days after its departure, Captain Montgomery became uneasy at its absence, and sent out several boats in search of his sons and the men who sailed with them, and these boats were kept on the search for about two weeks, but no trace could be found of the launch or men. Of their fate absolute ignorance has existed to this day, now nearly a quarter of a century since their disappearance. Captain Montgomery himself left the port of San Francisco with the *Portsmouth* on the fifth or sixth of December following.

(Now it appears to me that there are only two inferences which can be drawn from these facts, when considered with reference to the character and positions of the men and officers: One is, that they died during the period within which they should have returned to San Francisco; the other is, that they deserted from the service. The latter inference cannot be entertained for several reasons: First, desertion is the highest, and with cowardice, the basest of offences which can be committed by men in the naval service; it has never, it is believed, been charged upon a naval officer of the United States; it can never, therefore, be accepted as an explanation of any act of his, except upon the clearest proof. Second, if the case had been one only of desertion, and not of death, it is highly improbable that no intelligence should have been received of any of the men during the long period which has since elapsed. Besides, with respect to the sons of Captain Montgomery, the

natural effect of relationship must have led them to break the silence of years, and to seek communication with their father.

The theory of desertion would require us to believe that officers and men conspired to commit the basest of crimes, beside larceny of the public funds in their custody, and that for nearly a quarter of a century they have not only kept to themselves the secret of their crime, but have so secluded themselves, twelve in number, from observation, that no intelligence respecting any of them has reached the public.

If desertion cannot be received as a reasonable explanation of their conduct, then death must be inferred.

Death is the only fact which reconciles their conduct with the presumption of innocence, and with the ordinary conduct which officers and men of the navy pursue while in the public service. It is the sole fact which satisfactorily explains, according to the common experience and knowledge of men, which are proper grounds for judgment, the failure of the officers and men to return to San Francisco, and the absolute silence of the world since respecting them.

My mind is thus led irresistibly from the evidence to the conclusion, that the officers and crew on board the launch perished on the voyage to Sacramento, within a few days after their departure from San Francisco. They probably perished in the bay of San Pablo, or the bay of Suisun. If the accident which occasioned their death had occurred in the Sacramento river, it is probable that some of the men would have succeeded, from the narrowness of the stream, in reaching the shore; and probably some trace of the launch would have been discovered.

Finding, as I do, that John E. Montgomery died before the first of December, 1846, the conclusion follows, that the grant of Alcalde Bartlett, intended for him, was inoperative to pass the title.

A grant to a person deceased, is void. The instrument must be issued to a person in being, or it will be as invalid as if made to a fictitious party. The position of the plaintiff's counsel, that if the grantee were dead at the date of

1871.]

Opinion of the Court—Mr. Justice Field.

grant, his heir-at-law took the title, is not tenable. The case of *Landes v. Brant* (10 How. 373), cited in support of this position, is an authority against it. In that case, Clamorgan, the patentee, had died in 1814, and the patent issued in 1845. The Supreme Court said that, according to the common law, the patent was void for want of a grantee, but that the defect was cured by the Act of Congress of May 20, 1836, declaring: "That in all cases where patents for public lands have been or may hereafter be issued, in pursuance of any law of the United States, to a person who had died, or who shall hereafter die before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees and assigns of such deceased patentee, as if the patent had issued to the deceased person during life." This Act, of course, has no application to grants issued by Alcaldes in the Pueblo of San Francisco, whose authority never extended to the alienation of any public lands, but only to lands belonging to the Pueblo.

But, independently of the death of John E. Montgomery, before the first of December, 1846, the defendants have a perfect defense to the action, under the Statute of Limitations. The sixth section of that statute, as passed in 1850, provided that no action for the recovery of real property or its possession, should be maintained, unless the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises within five years before the commencement of the action. In April, 1855, this section was amended by the addition of a proviso, declaring that an action might be maintained by a party claiming real property or its possession under title derived from the Spanish or Mexican Government, or the authorities thereof, if the action was commenced within five years from the time of the final confirmation of such title by the Government of the United States, or its legally constituted authorities. In April, 1863, the section was restored to its original language, but a new section was enacted which, after providing that the time which had already run under the previous Act, should be computed as a portion of the time prescribed

Opinion of the Court—Mr. Justice Field.

[Aug.]

as a limitation in the new Act, declares “that any person claiming real property or the possession thereof, or any right or interest therein under title derived from the Spanish or Mexican Governments, or the authorities thereof, which shall not have been finally confirmed by the Government of the United States, or its legally constituted authorities, more than five years before the passage of this Act, may have five years after the passage of this Act in which to commence his action for the recovery of such real property, or the possession thereof, or any right or interest therein, or for rents or profits out of the same, or to make his defense to an action founded upon the title thereto; and provided, further, that nothing in this act contained shall be so construed as to extend or enlarge the time for commencing actions for the recovery of real estate, or the possession thereof, under title derived from Spanish or Mexican Governments, in a case where final confirmation has already been had, other than is now allowed under the Act to which this Act is amendatory.”

By this last Act, as I understand it, parties claiming real property under title derived from the Spanish or Mexican Governments, or the authorities thereof, which had not been finally confirmed by the Government of the United States, or its legally constituted authorities, were limited to five years after its passage within which to bring an action for the recovery of the property or its possession, but if the title had been thus finally confirmed, the parties were subject to the same limitations as though they derived their title from any other source. This construction of the Act is in accordance with a recent decision of the Supreme Court of this State in the case of *The Mayor etc., of San Jose v. Trimble*.

Final confirmation as defined in the Act, is deemed to be the patent of the United States, or the final determination of the official survey of the land under the Act of Congress of June 14, 1860.

The effect of this statute upon the action of the plaintiff is obvious. He claims the premises in controversy under title derived from the Mexican Government, not directly by

1871.]

Opinion of the Court—Mr. Justice Field.

immediate grant, but indirectly through the action of the Alcalde. That officer only had authority to alienate lands belonging to the pueblo; and the pueblo derived its claim and interest in its municipal lands under the general laws of Mexico. Its title was derived in the strictest sense of the terms, from the Mexican Government. That title, although finally confirmed in fact by the decree of the Circuit Court of the United States, entered in the case of the *United States v. The City of San Francisco*, on the eighteenth day of May, 1865, and the legislation of Congress upon the claim of the city has not been finally confirmed within the meaning of the Act of 1863. No patent has been issued to the city upon the decree of confirmation, and the official survey has not been finally determined under the Act of Congress of June 14, 1860. The case of the plaintiff falls, therefore, directly within the provision which requires the action to be brought within five years after the passage of the Act.*

Before leaving this subject it may be proper to say a few words further upon the source of title to the land within the limits of the pueblo of San Francisco, as described in the decree of the Circuit Court of the United States, as there is much difference of opinion on the subject between counsel.

The city of San Francisco, as successor of the pueblo, asserted title to four square leagues of land, embracing the site of the present city, and presented her claim for the same to the Board of Land Commissioners, created under the Act of March 3, 1851. The Board confirmed the claim to a portion of the land, and rejected it for the balance. The city, not satisfied with this determination, prosecuted an appeal from the decision to the District Court of the

*This view of the effect of the Statute of Limitations upon the right of action of the plaintiffs, is modified in the opinion filed on denying the motion for a new trial. (See *post* p. 676.) It is there held that the statute commenced running against the action of the plaintiff, from the first of July 1864, the date of the passage of the "Act to expedite the settlement of titles to lands in the State of California. That period expired in April, 1868, and the present action was not commenced until May, 1870.

Opinion of the Court—Mr. Justice Field.

[Aug.]

United States. From that Court the case was transferred to the Circuit Court, and by this latter tribunal the claim of the city was confirmed to the extent of four square leagues, and on the eighteenth of May, 1865, the decree was entered. In the prosecution of the case it was not contended by the counsel of the city that any specific grant of land had ever been made or issued to her by Spain or Mexico. Her claim to the four square leagues was founded upon the general laws of Mexico, by which pueblos, or towns, once established and officially recognized, were entitled for their benefit, and the benefit of their inhabitants, to the use of lands embracing the site of such pueblos, or towns, and of adjoining lands within certain limits. "This right," as was said by the Supreme Court in *Townsend v. Greeley* (5 Wallace, 336), and repeated in *Grisar v. McDowell* (6 Wallace, 372), "appears to have been common to the cities and towns of Spain from an early period in her history, and was recognized in the laws and ordinances for the settlement and government of her colonies on this continent. The same general system of laws for the establishment and government of pueblos and the assignment to them of lands, that prevailed in Spain, was continued in Mexico, with but little variation, after her separation from the mother country. These laws provided for the assignment to the pueblos, for their use and the use of their inhabitants, of land not exceeding in extent four square leagues."

Upon these laws as already stated, the city rested her claim. As no assignment of lands was made to the pueblo under the former Government, the claim or right of the city was an imperfect one, requiring recognition and confirmation in the mode prescribed by Congress, like other claims to property of an imperfect character derived from Spanish or Mexican authorities.

From the decree of the Circuit Court of the United States an appeal was taken to the Supreme Court; and whilst the case was pending there, Congress passed the Act of March 8, 1866, "to quiet the title to certain lands within the corporate limits of the city of San Francisco." By this Act, all the right and title of the United States, to the land

1871.]

Opinion of the Court—Mr. Justice Field.

situated within the corporate limits of the city, confirmed by the decree of the Circuit Court, were relinquished and granted to the city, and the claim of the city to the land was confirmed, subject, however, to the reservations and exceptions designated in the decree, and upon certain trusts as to the disposition of the land. "By this act," said the Supreme Court in *Grisar v. McDowell*, "the Government has expressed its precise will with respect to the claim of the city of San Francisco to her lands, as it was then recognized by the Circuit Court of the United States. In the execution of its treaty obligations with respect to property claimed under Mexican laws, the Government may adopt such modes of procedure as it may deem expedient. It may act directly by legislation upon the claims preferred, or it may provide a special board for their determination, or it may require their submission to the ordinary tribunals. It is the sole judge of the propriety of the mode, and having the plenary power of confirmation, it may annex any conditions to the confirmation of a claim resting upon an imperfect right, which it may choose. It may declare the action of the special board final; it may make it subject to appeal; it may require the appeal to go through one or more Courts, and it may arrest the action of the Board or Courts at any stage."

"The Act of March 3, 1851, is a general law applying to all cases, but the Act of March 8, 1866, referring specially to the confirmation of the claim to land in San Francisco, withdrew that claim, as it then stood, from further consideration of the Courts under the provisions of the general act. It disposed of the city claim and determined the conditions upon which it should be recognized and confirmed. The title of the city, therefore, rests upon the decree of the Circuit Court, as modified by the Act of Congress."

By the statement that the title of the city rests upon the decree of the Court, is meant that her title is that which is recognized and established by the decree. The decree must be read precisely as if the conditions prescribed in the Act of Congress had been inserted in the decree by the Court. No one would have doubted, if that had been done, that

Opinion of the Court—Mr. Justice Field.

[Aug.]

the title was Mexican in its origin, and to be treated like other imperfect Mexican titles when confirmed by authority of the United States.

It only remains to add that judgment must be entered for the defendants. If special findings are desired, the counsel for the plaintiff will prepare them and present them to me upon notice to the counsel of the adverse parties, for settlement; otherwise a general finding will be filed.

MOTION FOR NEW TRIAL.

The plaintiff's attorney moved for a new trial, before MR. JUSTICE FIELD, on the ground of newly discovered evidence, and alleged error in the finding of the Court, and in its ruling upon the Statute of Limitations. The Court denied the motion immediately after the argument, but stated that perhaps its opinion on the Statute of Limitations might require some explanation or modification; and if satisfied upon further consideration that such was the case, it would file a supplemental opinion on that point, but that its finding as to the death of the grantee at the time the grant was issued remaining, the judgment must stand as rendered, whatever qualification might be made in the opinion upon the Statute of Limitations.

Subsequently the following opinion was filed:

MR. JUSTICE FIELD. When the motion for a new trial was argued, the views expressed in the opinion of the Court upon the effect of the State Statute of Limitations of 1863, and particularly as to the time it began to run against the right of action of the plaintiff, were earnestly combatted by counsel. It was contended by them, that the statute only began to run from the passage of the Act of Congress of March 8, 1866, and that the legal title to the premises until then was in the United States. Whilst unable to agree with counsel in this position, I was so much impressed with their argument that I was induced to reconsider the opinion, and must now qualify in some particulars its conclusions.

The sixth section of the Statute of Limitations of 1863, as

1871.]

Opinion of the Court—Mr. Justice Field.

stated, provided, in substance, that parties claiming real property under title derived from the Spanish or Mexican Governments, or the authorities thereof, which had not been finally confirmed by the United States, or its legally constituted authorities, should be limited to five years after its passage, within which to bring an action for the recovery of the property or its possession, but if the title had been thus finally confirmed, the parties should be subject to the same limitations as though they derived their title from any other source, that is, they should have five years from such final confirmation. The statute, in another section, declared that by final confirmation was meant the patent of the United States, or the final determination of the official survey of the land under the Act of Congress of June 14, 1860. As no final confirmation, within the meaning of the statute, that is, as no patent had been issued to the city and no official survey had been made, the attention of the Court was drawn only to the provision of the statute for the commencement of actions within five years after its passage. It did not then occur to the Court, and was not suggested by counsel, that in consequence of the legislation of Congress by the Acts of July 1, 1864, and of March 8, 1866, no patent would ever issue to the city under the decree of confirmation, and that the Act of June 14, 1860, had been repealed. But such is undoubtedly the case. The Act of June 14, 1860, was repealed on the first of July, 1864; and it is not the practice of the Land Department of the United States, and there is no occasion for such practice, to issue patents for land granted by direct Act of Congress. A patent necessarily rests for its validity upon the legislation of Congress, and if the provisions of such legislation are complied with—and it is itself presumptive evidence of the fact—it passes all the title of the United States to the premises designated. A grant by direct Act of Congress differs only from a patent, in that it passes the title without any intermediate steps from the sovereign proprietor, whereas the patent is only issued through the action of subordinate officers. If any difference could exist in the grade of the two conveyances, the preference would fall to the legislative

Y. N. C. Co. v. N. C. Co.

Opinion of the Court—Mr. Justice Field.

[Aug.]

grant, as proceeding more immediately than the patent from the original source of title. But in truth, there is no such difference; both pass the title of the grantor to the extent designated.

Now, by the fifth section of the Act of Congress of July 1, 1864, "to expedite the settlement of titles to lands in the State of California" (13 Stats. 332), all the right and title of the United States to the lands within the limits of the city, as defined by its charter of 1851, were granted to the city for the uses and purposes specified in the Van Ness Ordinance, subject to certain exceptions. These exceptions consisted of all sites or other parcels of land which had been, or were then, occupied by the United States for military, naval, or other public uses, or such other sites or parcels as might thereafter be designated by the President within one year after the rendition to the General Land Office by the Surveyor-General of an approved plat of the exterior limits of the city, as recognized by the section, that is, as defined by the charter of 1851, in connection with the lines of the public surveys.

It is contended by counsel that the exception from the grant of such parcels as might be subsequently designated by the President, defeated the entire grant. Their position is that the act is void for repugnancy, because, to use their own language, it begins by granting all, and ends by reserving all to the grantor. But this position is clearly untenable. The grant is general, of all the lands within the limits of the charter of 1851, and the exception is of such sites or parcels of these lands as are or have been occupied by the United States, or may be designated by the President for particular uses. The power of future designation does not in terms extend so as to cover the whole grant, but only to parcels of the same. If the language of the exception would authorize, as supposed by counsel, the designation of one parcel after another until all the land granted was taken, it would not follow that the grant itself would fail, but only that the exception would be void for repugnancy. If the grant were between private parties it is possible that the exception would be regarded as void, either for uncer-

1871.]

Opinion of the Court—Mr. Justice Field.

1 tainty or repugnancy. The grant in such case would be
- taken most strongly against the grantor. But the grant
here being a legislative grant, it is the duty of the Court to
give effect so far as possible to the intent of the legislature,
if that can be ascertained, without reference to the techni-
cal rules which would control the construction of a private
grant. I am, therefore, of opinion that the right of the
Government to designate through the President, within a
limited time, parcels of land for public uses, could be main-
tained. It is not to be presumed that the President would
exercise the right so as to defeat the general purpose of the
grant, which was to quiet the title of possessors of lots in
the city under the Van Ness Ordinance. In this view the
title of the United States to all the lands within the charter
limits of 1851, should be regarded as having passed by the
act to the city with a right in the United States to resume
the title to parcels of these lands, upon the designation of
the President within a specified period. But, if I am mis-
taken in this view, the exception should be regarded as
void, and the titles as having passed at once without any
right in the United States subsequently to resume the title
to any parcels. It is of no practical consequence in this
case which construction is adopted, for no parcel within the
limits of the city, lying on the peninsula west of the bay,
was ever designated by the President, and the power of
designation on the peninsula was released by the Act of
March 8, 1866, in pursuance of which the claim of the city
was finally confirmed. The only designation ever made was
that of the island of Yerba Buena, which is situated in the
bay.

Now, though the title of the city, as stated in the previous
opinion, is Mexican in its origin and was recognized and
established by the decree of the Circuit Court of the United
States, as modified by the Act of Congress of March 8,
1866, yet all adverse interest of the Government to the lands
within the corporate limits of 1851 being released by the
Act of July 1, 1864, the titles conferred by the Van Ness
Ordinance became perfect legal titles. The act operated
upon such titles as effectually as a patent would have done.

Opinion of the Court—Mr. Justice Field.

[Aug.]

The contingent right reserved to the United States did not affect the perfect character of those titles, any more than a like right of the United States to take property for public uses upon compensation affects the title of such property. There is good reason, therefore, for the position of counsel of the defendants, that the Statute of Limitations of 1863 began to run against the right of action of the plaintiff on the first of July, 1864, if it be held that the statute did not run from its passage.

The statute allows, as already stated, five years after its passage for the commencement of an action, provided the title has not been previously perfected by final confirmation; if thus perfected, then five years from such confirmation. It does not contemplate the case of a final confirmation subsequently made, or, rather, it gives no force to such subsequent confirmation, and herein lies the defect of the statute. It is not competent for State legislation to impair the rights of the claimant flowing from subsequent confirmation.

Upon the acquisition of California the obligation devolved upon the United States to protect the inhabitants of the territory in their property. This obligation was recognized by express stipulations of the treaty. The obligation being political in its character could be discharged, as I have often had occasion to observe in this court, and when a member of the Supreme Court of the State, in such manner and on such terms as the Government might deem appropriate. By the Act of March 3, 1851, the Government determined the conditions upon which it would discharge this obligation to holders of titles from Mexican or Spanish authorities. It there established a tribunal for the consideration of all claims to land by virtue of such titles, and required their presentation before it for investigation within a prescribed period, with such evidence, documentary or otherwise, as the holders might possess; appointed law officers to appear and contest their validity; allowed appeals from the decisions of the tribunal to the Courts of the United States, and provided officers to survey and measure off the lands when the claims to them were finally adjudged to be valid.

1871.]

Opinion of the Court—Mr. Justice Field.

On the one hand the claimant was compelled by this Act, on pain of forfeiting his land, to present his claim to it before the tribunal thus created, and was subjected to numerous and expensive proceedings to establish its justice and validity. On the other hand the Government promised the claimant that if on the prescribed investigation and consideration by that tribunal, and the Courts of the United States on appeal, his claim was found to be valid, it would take such action as would render his title perfect, and give to him such evidence of ownership as would assure to him its possession and enjoyment. This legislation was not subject to any constitutional objection, so far as it applied to titles of an imperfect character; that is, to titles which required further action of the political department of the Government to render them perfect. The precise point was adjudged by the Supreme Court of the United States, in the case of *Beard v. Federey* (3 Wallace, 478-490), where language respecting claims to land in California, derived from Spanish or Mexican authorities, the obligation with reference to such claims devolved upon the United States upon the cession of the country, and the character and effect of the Act of Congress of March 3, 1851, is used, similar to that which is expressed and repeated, so often as to become almost trite, in numerous decisions of the Supreme Court of this State.

The Act of March 3, 1851, being constitutional, it is not within the legislative competency of the State to interfere with and defeat its operation. This follows necessarily from the sovereign and supreme authority of the United States over all matters connected with the treaty and the enforcement of obligations incurred thereby.

The Statute of Limitations of 1863, so far as it fixes a period after its passage within which actions must be brought for the recovery of real property claimed under titles of Mexican or Spanish origin, may not perhaps be open to any just objection where the titles are imperfect in their character and are unconfirmed. But to give effect to the statute so as to cut off or limit to the period designated after its passage, the right of action upon those titles, when

Opinion of the Court—Mr. Justice Field.

[Ang.]

subsequently confirmed and perfected, would be to defeat in many instances the legislation of Congress, and render it subordinate to the action of the State.

Many of the grants, as is well known, from Mexican and Spanish authorities, were for specific quantities of land lying within exterior boundaries embracing a greater quantity. They usually contained a clause providing for official segregation of the quantity designated, with a reservation of the surplus for the benefit of the nation. They were, notwithstanding this, accompanied with conditions of cultivation and occupancy, either expressed in the grants or annexed by force of law, and a compliance with them was essential to avoid a possible denouncement and forfeiture of the land. The grantees were therefore obliged to take possession, and their right of possession necessarily extended to the entire tract. They could not set apart for themselves any particular portion of the general tract equal, in their judgment, or according to their measurement, to the quantity specified. The authority to make a segregation, remained before the cession of the country with the former Government, and since the cession has remained with the new Government. The grantees were, therefore, interested to protect from injury and waste the entire tract, and to improve it, and, until official segregation, third persons could not interfere with this right to the possession of the whole. Until then, as was said in *Cornwall v. Culver* (16 Cal. 429), no individual could complain, much less could he be permitted to determine in advance that any particular locality would fall within the supposed surplus, and therefore justify its forcible seizure and detention by himself. "If one person," to use the language of the Court in that case, "could in this way appropriate a particular parcel to himself, all persons could do so; and thus the grantee, who is the donee of the Government, would be stripped of its bounty for the benefit of those who were not in its contemplation, and were never intended to be the recipient of its favors."

Such being the rights of grantees until official segregation, the Courts of this State have with strict justice given

1871.]

Opinion of the Court—Mr. Justice Field.

effect to them by sustaining actions of ejectment, until such segregation for the entire tract within the exterior boundaries. Much hardship has, in numerous cases, been the result of actions of this character. Many grantees throughout the country, probably the majority of them, have, therefore, from this consideration or to avoid the expenses of litigation, refrained from enforcing their rights in this respect. Now, if the statute of 1863 could be upheld when applied to actions upon titles confirmed subsequently to its passage, this absurd result would follow, if the confirmation were had more than five years afterwards, namely; that grantees would be barred from recovering the limited quantity to which they were ultimately found entitled after confirmation and survey, because they had not previously sued for and recovered a greater quantity. The grantees in that case would be required to sue, before confirmation, for more than they would be ultimately entitled to have set apart to them, and more than the former Government intended to grant to them, or be barred of all right of action for the quantity actually intended and finally assigned to them.

It is evident that the State Courts are incompetent to determine finally upon the rights of parties claiming by imperfect titles of Mexican or Spanish origin before their confirmation. A suit founded upon such title might be defeated by a ruling of a State Court, that the grant was invalid because issued without authority, or was forged, or abandoned, or because its conditions were not complied with, and yet if the grant should be adjudged valid in the proceedings before the Board of Commissioners created under the Act of March 3, 1851, and the tribunals of the United States on appeal from its decision, and a patent be issued, the judgment of the State Court would not be a bar to a new action upon the patent. And the reason is obvious; until the Government has discharged its obligations under the treaty with respect to such titles, the State Court can only look into the evidence respecting them for the purpose of determining the right of their holder to present possession. It can pass no judgment which will

Opinion of the Court—Mr. Justice Field.

[Aug.]

impair the ultimate determination of the appropriate federal tribunals respecting their validity.

If an adverse judgment by a State Court upon the unconfirmed title would not bar an action upon the confirmed title, it must necessarily follow that the absence of any action upon the title before confirmation cannot be effectual as a bar to an action after confirmation.

It would seem from the argument of counsel, that the difficulty experienced by them upon the subject under consideration, has arisen from the idea that its determination depends upon the character of the title derived from Mexican or Spanish authorities as equitable or legal. But its determination does not depend upon this distinction. Equitable titles, so called, are strictly mere claims upon the Government for titles, and are founded upon some service rendered or other consideration given to the Government, or promise by it. They constitute no estate in the land, and, unless accompanied with the right of possession, do not authorize any action for the recovery of the land. Grants in California from Mexican or Spanish authorities conferred something more than mere equitable titles, as thus understood; they passed to the grantees a present and immediate interest in the premises designated; they conferred a legal title, though generally, for want either of departmental approval or official segregation, one which was imperfect in its character. The question in all cases of this kind, is not whether the title is equitable or legal, but whether it is perfect or imperfect. If imperfect, it is under the control of the Government of the United States, and any regulations which that Government may prescribe for the purpose of protecting and perfecting it. The action of that Government, and the right of possession and enjoyment which perfected title gives, cannot be defeated or in any respect impaired by State legislation. As against the perfected title, the State Statute of Limitations can only begin to run from the date of the consummation of the title.

/ In the present case the act of July 1, 1864, as already stated, operated upon the premises designated in perfecting

1871.]

Syllabus.

the title as effectually as a patent of the United States. It is no objection to the efficacy of the act that it was passed in advance of the period when a patent would ordinarily have been issued, and thus rendered a patent unnecessary.

It follows from the views expressed that the sixth section of the State statute of 1863 is invalid so far as it applies to actions for the recovery of real property founded upon titles derived from Mexican or Spanish authorities, perfected after its passage, either by Act of Congress or by judicial decree, survey and patent, and that, as to titles thus perfected, the ordinary period of limitation must be allowed from the date of their consummation which exists with reference to actions on complete title from other sources.

It follows, also, that the statute in the present case began to run against the right of action of the plaintiff on the first of July, 1864, and not on the eighteenth of May, 1863. The former opinion must, therefore, be modified in accordance with these views.

THE COLE SILVER MINING COMPANY v. THE VIRGINIA AND GOLD HILL WATER COMPANY *et al.*

CIRCUIT COURT, DISTRICT OF NEVADA,
OCTOBER 6, 1871.

1. **INDISPENSABLE PARTIES.**—One whose rights will necessarily be affected by the operation of a decree in equity is an indispensable party to the action, and the Court will not proceed to a decree without his presence.
2. **PROPER PARTIES.**—Where a decree can be made settling the rights of the parties before the Court, without affecting the rights of others absent, the Court may proceed to a decree, although those absent might be proper parties to the action.
3. **JURISDICTION OUSTED.**—Where the bringing in of an absent party, whose presence might otherwise be deemed material, would oust the Court of jurisdiction; the Court will "strain hard" to grant relief as to the parties before it.

4. **MANDATORY PRELIMINARY INJUNCTION.**—In a proper case, a Court of Equity will grant a preliminary injunction in a restrictive form, although an obedience to the injunction should require the performance of substantive acts on the part of the party enjoined.
5. **DENIAL ON INFORMATION.**—The Court will not dissolve a preliminary injunction upon the denials of the equities of the bill made upon information and belief merely; nor upon affirmative allegations of new matter meeting the equities of the bill made only upon information and belief.

Before MR. JUSTICE FIELD.

Motion to dissolve an injunction on bill and answer. The facts sufficiently appear in the opinion, and in the report of the same case before SAWYER, Circuit Judge, on motion for an injunction, *ante* 470.

Mitchell & Stone and *S. W. Sanderson*, for complainants.

R. S. Mesick and *Williams & Bixler*, for defendants.

MR. JUSTICE FIELD. This is a motion to dissolve an injunction issued upon the bill of complaint. It is made upon three grounds:

1. That Herman Glauber, who is a citizen of the State of California, is an indispensable party defendant in the suit, without whose presence the Court cannot proceed to a decree.

2. That the injunction, though preventive in form, is mandatory in fact, and an injunction of this character cannot issue upon an interlocutory application.

3. That the equities of the bill are fully denied by the answer.

I. The question whether Glauber is an indispensable party depends upon the further question, whether he is materially interested in the matter in controversy, or object of the suit, and that interest would be necessarily affected by any available decree consistent with the case presented by the bill.

It is undoubtedly a general rule in equity that all persons materially interested in the matter in controversy, or object of the suit, should be made parties in order that complete justice may be done and a multiplicity of suits be

1871.]

Opinion of the Court—Mr. Justice Field.

avoided. And usually when it appears that persons thus interested are not brought in, the Court will order the case to stand over until they are made parties. A Court of Equity, as has been said by a distinguished Chancellor, delights to do complete justice, and not by halves. But sometimes, from the residence of parties thus interested, the Court is unable to bring them all before it. Particularly is this so with the Circuit Court of the United States, which possesses no power to authorize a constructive service of process upon absent or non-resident defendants, and which can only exercise its jurisdiction in that class of cases depending upon the citizenship of the parties, where all the parties, however numerous on one side, are from a State different from that of the parties on the other side. In all such cases, the Court will consider whether it is possible to determine the controversy between the parties present, without affecting the interests of other persons not before the Court, or by reserving their interests. If the interests of those present are severable from the interests of those absent, such determination can generally be had, and the Court will proceed to a decree. But if the interests of those present and those absent are so interwoven with each other, that no decree can possibly be made affecting the one without equally operating upon the other, then the absent persons are indispensable parties, without whom the Court cannot proceed, and, as a consequence will refuse to entertain the suit. (*Shields v. Barrow*, 17 How. 130; *Barney v. Baltimore City*, 6 Wallace, 280.)

The inquiry then, is this: whether Glauber possesses any interest in the controversy, or object of the suit, which is so interwoven with that of the other defendants, that no available decree consistent with the case presented by the bill, can be rendered against them, which will not necessarily affect him. The suit is brought to prevent a diversion of water of which the complainant claims to be the owner by discovery and prior appropriation. The water, or which amounts to the same thing, the exclusive use of it, is the matter in controversy, and the substantial object of the suit is to prevent any interference with such use by the defend-

ants. Glauber, according to the allegation of the bill, is not interested in the water in controversy, but only in the tunnel by means of which the water is diverted.

Now if a decree can be rendered which will secure to the complainants the exclusive use of the water, and at the same time leave the right and interest of Glauber in the tunnel unimpaired, the objection founded upon his absence as a party defendant will not be tenable. The learned counsel of the defendants intimated on the argument of the case, that should the Court ultimately determine that the complainant is entitled to the water, it might be necessary to decree that the tunnel be filled up. If only a decree of that character can be rendered to give protection to the complainant's rights, then undoubtedly Glauber is an indispensable party. But the complainants' counsel suggest several forms in which a decree may be made protecting the asserted rights of the complainants without in any respect trenching upon Glauber's rights in the tunnel. The defendants might, for instance, be restrained from interfering with the water or performing acts to prevent the resumption by the complainants of its possession and use. It is stated, that even if the defendants should not be decreed to do any specific act, such as the erection of a bulk-head, or the restoring of the water diverted, a decree would not be altogether fruitless which would allow the complainants to pump the water from the bed of the Nevada Tunnel into its own tunnel, provided no counter work should be carried on in the Nevada Tunnel to prevent such pumping; or allow the complainants to resume possession of the water at the mouth of the tunnel. A decree which would enjoin the defendants from opposing the complainants' resumption of the water in either of these modes, would substantially accomplish the objects of the suit, and at the same time leave the Nevada Tunnel and the interests of Glauber therein as they existed previously.

It would certainly be going a great way, and not entirely consistent with proper respect for my associate, who is possessed, in the Circuit Court, with equal authority with myself, if I should undertake to determine against his con-

1871.]

Opinion of the Court—Mr. Justice Field.

clusions upon substantially the same representation of facts, without leave first granted for a re-argument of the question, that Glauber is an indispensable party, and thus decide, in advance of the presentation of the entire case, that no decree could possibly be rendered which would afford protection to the complainant without infringing upon the rights of the absent Glauber. I shall leave the matter to his determination, simply observing, that in a case of this kind, when the absent person alleged to be interested would, if brought into Court, oust its jurisdiction, I should follow the course suggested by Mr. Justice Story in *West v. Randall* (2 Mason, 196), and strain hard to give relief as between the parties before the Court.

II. The injunction, although preventive in form, is undoubtedly mandatory in fact.

It was intended to be so by the Circuit Judge who granted it, and the objection which is now urged for its dissolution was presented to him, and was fully considered. I could not with propriety reconsider his decision, even if I differed from him in opinion. The Circuit Judge possesses, as already stated, equal authority with myself in the Circuit, and it would lead to unseemly conflicts, if the rulings of one Judge, upon a question of law, should be disregarded, or be open to review by the other Judge in the same case.

But were I not restrained by this consideration from interfering with the order of the Circuit Judge, I should hesitate before dissolving the injunction upon the ground stated. The benefit of the preventive remedy afforded by Courts of Equity in the process of injunction would often be defeated, if the remedy only extended to cases where obedience would not require any affirmative acts on the part of the party enjoined.

The owner of flumes, aqueducts or reservoirs of water might, for instance, flood his neighbor's fields by raising the sluice gates to these structures, and, if the flowing should not be speedily stayed, might destroy the latter's crops; and yet, according to the argument of the learned counsel, no injunction could issue to restrain the owner

from continuing the flood, if obedience to it should require him to do the simple affirmative act of closing his gates. The person whose fields were inundated and whose crops were destroyed, in the case supposed, would find poor satisfaction in being told that he must wait until final decree before any process could issue to compel the shutting of the gates, and he must seek compensation for the injuries his property may suffer in the meantime, in an action at law.

There is no species of property requiring more frequently for its protection and enjoyment the aid of a Court of Equity, and particularly of its preventive process of injunction, than rights to water. For purposes of mining as well as for ordinary consumption, water is carried in the mining regions of Nevada and California over the hills and along the mountains for great distances, by means of canals and flumes and aqueducts, constructed with vast labor and enormous expenditures of money. Whole communities depend for the successful prosecution of their mining labors upon the supply thus furnished; and, it is not extravagant to say that much of the security and consequent value of this species of property is found in the ready and ample protection which Courts of Equity afford by their remedial processes of injunctions, anticipating threatened invasions upon the property, restraining the continuance of an invasion when once made, and preserving the property in its condition of usefulness until the conflicting rights of contesting claimants can be considered and determined. The limitation of the process to cases calling for no affirmative action on the party enjoined would strip the process in a multitude of cases of much of its practical benefit.

I am aware that there are adjudications of tribunals of the highest character denying the authority of a Court of Equity, on a preliminary application, to issue an injunction, even in a restrictive form, when its obedience would require the performance of a substantive act.

Such is the case of *Andenreid v. The Philadelphia & Reading Railroad Company*, recently decided in the Supreme Court of Pennsylvania, to which my attention has been called by the defendant's counsel (since reported in 68 Penn.

1871.]

Opinion of the Court—Mr. Justice Field.

State Rep. 370). The opinion in that case was delivered by Judge Sharswood, who is a jurist of national reputation, and anything which falls from him is justly entitled to great consideration. He states that the authorities both in England and in this country are very clear that an interlocutory or preliminary injunction cannot be mandatory. By this he means, I suppose, that the authorities show that such an injunction cannot be mandatory in form, for he refers to the case of *Lane v. Newdigate* (10 Vesey, 193), where Lord Eldon ordered an injunction to be drawn so that, although restrictive on its face, it compelled the defendants to do certain specific things. Of that case the learned Judge observes that it is not a precedent which ought to be followed in any Court, and that a tribunal which finds itself unable directly to decree a thing, ought never to attempt to accomplish it by indirection.

Notwithstanding the great respect I entertain for the opinions of Judge Sharswood, and for the decisions of the Supreme Court of Pennsylvania, I am not prepared to assent to the view of the authorities stated in the case cited, nor to the conclusion there expressed that the cases in England ought not to be followed in any instance.

Certain it is that the jurisdiction of the Court of Chancery in England to decree in special cases upon motion the issue of injunctions which, though restrictive in form, may still require for their obedience the performance of substantive acts, has been uniformly maintained since the time of Thurlow. In *Robinson v. Byron* (1 Brown's Chancery Cases, 588) a motion was made for injunction upon affidavits, stating that since April 4, 1785, the defendant who had large pieces of water in his park, supplied by a stream which flowed to the mill of the plaintiff, had at one time stopped the water, and, at another time let in the water in such quantities as to endanger the mill. The Lord Chancellor, Thurlow, ordered an injunction to restrain the defendant "from maintaining or using his shuttles, floodgates, erections and other devices, so as to prevent the water flowing to the mill in such regular quantities as it had ordinarily done before the fourth of April, 1785." The defendant

was, therefore, compelled by this injunction, to remove such floodgates and other erections as he had constructed, if they impeded the regular flow of the water as it had existed before the date designated.

In *Lane v. Newdigate* (10 Vesey, 192), already mentioned as referred to by Judge Sharswood, the plaintiff was assignee of a lease granted by the defendant for the purpose of erecting mills and other buildings, with covenants for the supply of water from canals and reservoirs on the defendant's estates, reserving to the defendant the right of using the water for his own collieries. The bill prayed generally that the defendant might be decreed to use and manage the waters of the canal, so as not to injure the plaintiff in the occupation of his manufactory, but particularly that the defendant might be restrained from using certain locks, and thereby drawing off the water which would otherwise run to and supply the manufactory, and be decreed to restore a particular cut for carrying away the waste waters, and a certain stop-gate, and to restore the banks of the canal to their former height, and also to repair such stop-gates, bridges, canals and towing-paths as existed previous to the lease, and to remove certain locks since made. Upon motion for an injunction, the Lord Chancellor, Eldon, expressed a doubt whether it was according to the practice of the Court to decree repairs to be done, but finally made an order restraining the defendant from impeding the plaintiff in the use and enjoyment of the demised premises and the mills erected thereon, and the privileges granted by the lease, by continuing to keep the canals, or the banks, gates, locks or works out of repair; and from preventing such use and enjoyment by diverting the water or the use of any locks erected by the defendants, or by continuing the removal of the stop-gate, the Chancellor observing at the same time that the injunction would create the necessity of restoring the stop-gate.

In *Rankin v. Huskisson* (4 Simons, 13), the defendants, were restrained on motion by Vice-Chancellor Shadwell from continuing the erection of stables on certain premises agreed to be laid out as an ornamental garden, adjoining a

1871.]

Opinion of the Court—Mr. Justice Field.

club-house, and from preventing such part of the building as was already erected from remaining thereon. They were therefore compelled to remove the building already commenced.

In *Hepburn v. Lordon* (2 Hemming and Miller, 345), the defendants were restrained upon motion by Vice-Chancellor Wood from allowing inflammable damp jute deposited on premises adjoining those of the plaintiff, to remain there, and from bringing any more in such quantities as to occasion danger to the plaintiff's property.

Other cases to the same purport might be cited, but these are sufficient, I think, to show that a Court of Equity has jurisdiction to issue, upon an interlocutory application, an injunction which will operate to compel the defendants, in order to obey it, to do substantive acts. It is a jurisdiction which should only be exercised in a case where irreparable injury would follow from a neglect to do the acts required. Some of the adjudged cases evince a disposition on the part of the Court to restrict rather than enlarge this jurisdiction. (*Blakemore v. Glamorganshire Canal Company*, 1 Mylne and Keen, 154.) Undoubtedly, the general purpose of a temporary injunction is to preserve the property in controversy from waste or destruction or disturbance until the rights and equities of the contesting parties can be fully considered and determined. Usually this can be effected by restraining any interference with it; but in some cases the continuance of the injury, the commencement of which has induced the invocation of the authority of a Court of Equity, would lead to the waste and destruction of the property. It is just here where the special jurisdiction of the Court is needed—to restore the property to that condition in which it existed immediately preceding the commencement of the injury, so that it may be preserved until final decree.

III. It only remains to consider whether the equities of the bill are so fully denied by the answer as to justify the dissolution of the injunction.

The material allegations of the bill are that the complainant, in running certain tunnels into its mining claims, dis-

covered and appropriated the water in controversy; and that the defendants subsequently, by means of the Nevada Tunnel, struck the water, and diverted it from the complainant. These allegations are not positively denied by the answer.

The construction of the tunnels of the complainant, and the diversion of the water by the defendants through the Nevada Tunnel are admitted. The discovery and prior appropriation of the water by the complainant are only denied upon information and belief; and every denial which relates to the title of the water is made in a similar manner.

Denials in that form may be sufficient to raise an issue for trial, but they amount, for the purposes of the motion, to no more than hearsay evidence. They will not justify the dissolution of the injunction.

“The sole ground,” says Mr. Justice Story, “upon which the defendants are entitled to a dissolution of an injunction upon an answer, is, that the answer in effect disproves the case made by the bill, by the very evidence extracted from the conscience of the defendant, upon the interrogation and discovery sought by the plaintiff to establish it. But what sort of evidence can that be, which consists in the mere negation of knowledge by the party appealed to? Such negation affords no presumption against the plaintiff’s claims; but merely establishes, that the defendant has no personal knowledge to aid it or disprove it. It is upon this ground that it has been held, and in my judgment very properly held, that if the answer does not positively deny the material facts, or the denial is merely from information and belief, it furnishes no ground for an application to dissolve a special injunction.” (*Poor v. Carlton*, 3 Sumner, 78; see, also, *Roberts v. Anderson*, 2 Johns. Ch. 202; *Ward v. Van Bokkelen*, 1 Paige, 100; *United States v. Parrott*, 1 McAllister, 300.)

The same objection applies to the allegations respecting the new matter relied upon to establish prior rights in the two Schiels, with whom the defendants claim to be in privity.

Upon inspection of the answer, it appears that all which is stated in relation to the origin, working, continuance and

1871.]

Syllabus.

transfer to the defendants of the claims of these parties is founded upon information and belief.

The statement does not purport to be made upon any personal knowledge, possessed by the defendants, but only "according to their information and belief." Allegations resting upon this foundation furnish no ground for disturbing the injunction. For all the purposes of this motion the case stands precisely as though these allegations were omitted from the answer.

The questions suggested by the learned counsel of the defendants—whether the water exists in such state or condition as to render its diversion, under the circumstances, remediable, or anything more than *damnum absque injuria*; and whether the injunction is consistent with the policy and license of the General Government to miners upon public lands—can be better considered and more justly determined on the hearing after the entire facts of the case are developed by the evidence.

Upon the case as presented, I am of opinion that the injunction should be continued until the hearing. The motion to dissolve the injunction is therefore denied.

THE GERMAN SAVINGS AND LOAN SOCIETY v. GEORGE OULTON.

CIRCUIT COURT, DISTRICT OF CALIFORNIA,
SEPTEMBER 18, 1871.

1. SECTION 110, INTERNAL REVENUE ACT CONSTRUED.—The one hundred and tenth section of the Revenue Act of the United States, as amended on the thirteenth of July, 1866, enacts that "there shall be levied, collected and paid a tax of one twenty-fourth of one per centum each month upon the average amount of the deposits of money, subject to payment by check or draft, or represented by certificates of deposits or otherwise, whether payable on demand or at some future day, with any person, bank, association, company or corporation engaged in the business of banking," with a proviso that "deposits in associations or companies known as provident institutions, savings banks, savings funds or savings institutions, having no capital stock and doing no other business than

Opinion of the Court—Mr. Justice Field.

[Sept.]

receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits, without profit or compensation to the association or company, shall be exempt from tax on so much of their deposits as they have invested in securities of the United States, and on all deposits less than five hundred dollars made in the name of any one person:" *Held*, that where in an action to recover back moneys, paid under protest for taxes, the plaintiff in his complaint negatives the existence of the conditions required in the general clause of this section, it is unnecessary for it also to bring itself by its allegations within the terms of the proviso.

2. CLASS OF DEPOSITS TAXABLE.—The deposits which are liable to taxation under the above section, are those which are in all cases subject to payment by check or draft, or otherwise; that is, the liability of payment to the depositor, on the part of the bank or banker, must be absolute and not contingent. The payment must be made under all circumstances, either on demand or at some definite period, and not be dependent upon the occurrence of losses, or the acquisition of profits, or any other event.
3. CASE DISTINGUISHED.—This case distinguished from the case of *The Bank of Savings v. The Collector* (3 Wall. 475).

Before Mr. Justice FIELD.

THIS was an action brought by the plaintiff, a corporation created under the laws of California, against the defendant, collector of taxes of the United States for the first collection district of California, to recover taxes paid to him by the plaintiff under protest. The facts are sufficiently set forth in the opinion of the Court.

L. D. Latimer, U. S. District Attorney, moved for judgment in favor of the defendants, on the pleadings.

Jarboe & Harrison, for plaintiff, opposed.

Mr. Justice FIELD. The one hundred and tenth section of the Revenue Act of the United States, as amended on the thirteenth of July, 1866, enacts that "there shall be levied, collected and paid a tax of one twenty-fourth of one per centum each month upon the average amount of the deposits of money, subject to payment by check or draft, or represented by certificates of deposits or otherwise, whether payable on demand or at some future day, with any person, bank, association, company, or corporation engaged in the business of banking," with a proviso that "deposits in associations or

1871.]

Opinion of the Court—Mr. Justice Field.

companies known as provident institutions, savings banks, savings fund or savings institutions, having no capital stock and doing no other business than receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits, without profit or compensation to the association or company, shall be exempt from tax on so much of their deposits as they have invested in securities of the United States, and on all deposits less than five hundred dollars made in the name of any one person." (14 Stats. at Large, 136 and 137.)

The plaintiff, the German Savings and Loan Society, is a corporation created under a statute of California, for the purpose of aggregating the funds and savings of its members and others, and of preserving and safely investing the same for their common benefit. Its principal business consists in loaning at interest its own funds and moneys deposited with it for that purpose, upon certain specified securities; in collecting the interest on the loans when made, and the principal of the same, as they respectively become due; and in reinvesting the proceeds, or in applying them in payment of the depositors, or to the uses prescribed by the by-laws of the institution.

In 1870, and up to March of the present year, the defendant was Collector of taxes of the United States for the first collection district of California, within which the plaintiff has its office and principal place of business; and as such officer he claimed that the plaintiff was liable, under the above section of the Revenue Act, as a corporation engaged in the business of banking, to a tax of one twenty-fourth of one per cent. each month on the average amount of moneys deposited with it during that period for loan and investment.

The plaintiff refused to pay the tax thus claimed on the moneys deposited for the months of August, September and October of the past year, and the Collector accordingly, in February last, levied upon the property of the institution to enforce the payment, and was about to expose the property to sale, when the plaintiff paid the tax under protest. The present action is brought to recover back the money

thus paid, ~~amounting~~ to upwards of twenty-six hundred dollars.

The District Attorney moves for judgment in favor of defendant, upon the pleadings. The complaint negatives the existence of the conditions required in the general clause of the above section to authorize the imposition of the tax; but the District Attorney contends that the plaintiff must also, in pleading, bring itself within the terms of the proviso to that section; and not having done so, that judgment must go against it upon its own allegations. This position is not tenable. The authority for the tax must be found in the general clause of the Act. The proviso only excepts from the operation of that clause a case which would otherwise be covered by it. Its object is to limit, not to extend, the general clause. That clause declares that a tax shall be levied and collected upon deposits of money, payable in a specified way, made with any person, association or corporation engaged in the business of banking. The proviso excepts deposits thus designated when they are made with particular banking institutions, and are invested in securities of the United States, or when the deposits in the name of one person amount to less than five hundred dollars.

If the plaintiff were within the terms of the general clause, and were exempt from taxation on its deposits only by virtue of the proviso, it would be obliged in its complaint to allege the facts creating the exemption; but as it denies that it is within the terms of the general clause, it is only necessary for it to make sufficient allegations to exclude itself from the operation of those terms.

The deposits which are liable to taxation are those which are subject to payment by check or draft, or those which are represented by certificates of deposit, or in some other form, payable either on demand or at some future day. The deposits must in all cases be subject to payment by check, draft or otherwise; and that means that the liability of payment to the depositor, on the part of the bank or banker, must be absolute and not contingent; that the payment must be made, under all circumstances, either on demand or at some definite period, and not be dependent upon

1871.]

Opinion of the Court—Mr. Justice Field.

the occurrence of losses, or the acquisition of profits, or any other event. The deposits must also be made with a person, bank, association or corporation engaged in the business of banking.

The seventy-ninth section of the **Revenue Act, as amended** in 1866, declares, “that every incorporated or other bank, and every person, firm or company, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes; or where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker.” (14 Stats. at Large, 115.)

It will be here seen, also, that when credits are opened by deposit or collection of moneys, the deposits are subject to payment or remittance upon draft, check or order.

Banks are generally classed under one of three heads—namely, banks of deposit, banks of discount, and banks of circulation. The distinctive feature of the first class lies in their liability to repay the deposits made with them, either on demand or at some definite time. This absolute liability of repayment is expressed in the statutory definition already cited, and is recognized by all the text writers.

In the case of *The Bank of Savings v. The Collector* (3 Wall. 495), relied on by the District Attorney, the bank could be required to make payments on four stated days in the year. It therefore held its deposits payable at some future day, and was thus brought within the very terms of the general clause of the section in question. The decision in that case was placed upon the express ground that the bank was under obligation to pay each depositor the amount deposited by him when demanded, agreeably to its by-laws and charter.

The complaint in this case alleges that the plaintiff has been, at all times since its incorporation, engaged solely in the business of receiving such moneys as were placed in its hands by persons doing business with it, lending and in-

vesting moneys upon mortgages on real estate, and applying the interest accruing from the investments.

1st. To the payment of the expenses of conducting the business of the corporation;

2d. To the creation of a reserve fund, for the security of those doing business with it; and

3d. To the payment of the remaining portions of the interest, *pro rata*, to such persons as had placed money with it for keeping and investment; and that all the moneys deposited with it have been so deposited upon an agreement that they shall be reimbursed to the depositor only out of the first disposable funds that shall come into the control of the corporation after demand for reimbursement, and after the payment of all sums for the reimbursement of which previous demands shall have been made; and that the depositors shall rely, for indemnification for any losses that may occur in the investment of their moneys, solely upon the guaranteed capital and reserve fund of the corporation.

It also alleges that the plaintiff has never been engaged in the business of banking, specifically designating the business, the transaction of which constitutes an institution a bank, within the definition contained in the seventy-ninth section of the Act; and that it has never had or held on deposit any sum or sums of money whatsoever subject to payment by check or draft, or represented by certificates of deposit, or represented in any other manner than by the investments mentioned, or payable to any person or persons on demand, or in any other manner than as above stated.

If these allegations can be sustained by proper proof, the plaintiff will be entitled to recover; its appeal to the Secretary of the Treasury for relief against the amount of the tax having been duly taken, and an adverse decision having been rendered thereon within six months previous to the commencement of the action.

It follows that the motion for judgment in favor of the defendant on the pleadings, must be denied; and it is so ordered.

UNITED STATES *v.* JOHN WALLER.

CIRCUIT COURT, DISTRICT OF CALIFORNIA,
AUGUST 26, 1871.

1. INFORMATION.—Misdemeanors may be prosecuted in the national Courts by information.

Before Mr. Justice FIELD, and SAWYER, Circuit Judge.

AN indictment against the defendant for an “offense not capital, or otherwise infamous,” having been quashed, and there being urgent reasons for a speedy trial, and no Grand Jury in session at the time, the District Attorney filed an information, alleging the offense charged. The defendant moved to quash the information, on the ground that the offense, although a misdemeanor, could only be prosecuted by indictment.

Milton Andros, for defendant.

L. D. Latimer, U. S. District Attorney, for plaintiff.

Mr. Justice FIELD. We are of the opinion that an information may be filed by the District Attorney, in behalf of the United States, in the national Courts, for misdemeanors committed against the laws of the United States. The motion to quash the information in this case is, therefore, denied.

NATHAN W. SPAULDING v. NATHANIEL PAGE *et al.*,
AND NATHAN W. SPAULDING v. J. R. DUFF *et al.*

CIRCUIT COURT, DISTRICT OF CALIFORNIA,
AUGUST 19, 1871.

1. RECOVERY AGAINST WRONGFUL VENDOR OF PATENTED MACHINE.—EFFECT ON VENDEE.—Where a patentee does not use the patented machine himself, nor establish a patent fee, but manufactures the patented article and sells at fixed prices, seeking his compensation in the profits of the manufacture and sale at such fixed prices, and another party infringes the patent by making and selling the patented article; and where the patentee sues the party so infringing, and claims to recover, and does recover, the full amount of profits, which he himself would have obtained on said articles, had he manufactured and sold them at his ordinary prices, by such claim and recovery he adopts the sale made by the party infringing, and the right to use the specific articles so sold, and for which the recovery has been had, vests in the purchasers.

Before SAWYER, Circuit Judge.

BILL in equity to restrain the use of certain saw-teeth patented by complainant, and for an account of profits. The facts appear in the opinion of the Court.

M. A. Wheaton and *Alfred Rix*, for complainant.

Hall McAllister, for defendants.

SAWYER, Circuit Judge. The complainant is the patentee of a certain improvement in saws, which consists in inserting upon circular lines in sockets, fitted for the purpose, detachable teeth, in such a manner as to obviate the cracking of the saw-plate.

He has not sold patent rights, nor established any royalty to be paid for the use of the patent.

The complainant, himself, manufactures and sells saws with teeth inserted upon the principle patented, and he inserts teeth in saw-plates for parties desiring to use his patent, and, also, manufactures and furnishes teeth to supply the places of those worn out, broken, or otherwise become useless.

1871.]

Opinion of the Court—Sawyer, J.

His manufactory is of sufficient capacity to enable him, thus far, to supply the demand on the Pacific coast.

He has a fixed price for saws of given dimensions; a fixed price for inserting teeth in other saw-plates, and a fixed price for teeth furnished to supply the places of those worn out, or otherwise destroyed.

He derives his profits on his patent wholly from the manufacture and sale of saws, with his patent teeth; the making and inserting of teeth in saw-plates owned by others, and the making and furnishing of extra teeth for use in the places of those worn out in the manner before indicated; and not from a sale to others of the right to manufacture, or from any royalty for the manufacture or use of his patented teeth.

While complainant was thus engaged in supplying the market with his patent teeth, William Tucker sold a number of saws, and furnished a number of saw-teeth, in the State of California, manufactured by the American Saw Company, which were claimed to be an infringement on said patent, and complainant brought an action at law in the Circuit Court of the United States for the District of California against said party for infringing said patent; and, in said action, recovered judgment for all damages sustained by sales of said saws and furnishing said patented saw-teeth, made by said American Saw Company, prior to October 26, 1869.

Said Tucker and one Putnam continuing to sell said American Saw Company's saws, and furnish their saw-teeth, said complainant afterwards, on November 30, 1869, commenced another action against them on the equity side of said Court, to recover damages and profits for the sale of said saws and teeth made subsequent to said judgment at law, and to restrain further infringements of said patent.

In this action, complainant recovered for all saws sold, and teeth furnished, by said parties subsequent to those sales for which there had been a recovery in said former action, and prior to the injunction in the latter, and, also, obtained a decree for a perpetual injunction against said Tucker and Putnam, restraining them from further infring-

Opinion of the Court — Sawyer, J.

[Aug.]

ing complainant's patent by making, selling, or using saws embodying said invention.

The defendants in the two actions of *Spaulding v. Page et al.*, and *Spaulding v. Duff et al.*, now under consideration, are owners of saw-mills. They respectively purchased of said Tucker and Putnam, several saws of the American Saw Company's manufacture, and sundry teeth, and used them in their saw-mills.

The said actions were brought by said complainant, November 30, 1869, against said several defendants for infringing said patent by the use in their saw-mills, respectively, of the said saws and teeth of the American Saw Company's manufacture, so purchased of said Tucker and Putnam, the said complainant asking an account of profits resulting from the use of said saws, and an injunction restraining their further use.

The said saws and teeth so used by the defendants, *Page et al.*, and defendants *Duff et al.*, are the saws and teeth purchased of said Tucker and Putnam, and they are a portion of the identical saws and teeth embraced in the said action at law of *Spaulding v. Tucker*, and said action in equity of *Spaulding v. Tucker and Putnam*, in which a recovery for damages and profits for the manufacture and sale of said saws and teeth has already been had.

These defendants have used no saws, or teeth, which embody the said patented invention, except those identical saws and teeth, sold by said Tucker and Putnam to them; and the damages and profits resulting from the manufacture and sale of these identical saws and teeth, have already been recovered by said complainant in said two actions, one against said Tucker, and the other against said Tucker and Putnam.

The complainant having recovered from Tucker and Putnam the full amount of the profits on the manufacture and sale of the saws and teeth in question, is he now, also, entitled to recover from the vendees of Tucker and Putnam, the profits arising from the use of the same specific saws and teeth?

As singular as it may seem, I do not find this precise question decided in any of the numerous American patent cases.

1871.]

Opinion of the Court—Sawyer, J.

The defendants maintain, that the recovery of the full amount of the profits, of making and selling the saws and teeth from Tucker and Putnam, operates to transfer to them and their vendees the right to those specific patented implements, and to their use in the same manner as a recovery of the value of an article in trespass, or trover, vests the title in the wrong-doer.

But the complainant insists that this principle has no application to patent rights, where the patentee has a continuing exclusive right during the life of his patent, which he cannot be compelled by a wrong-doer to dispose of *in invitum* in this mode.

Some observations of Mr. Justice STORY in *Earle v. Sawyer* (4 Mas. 1), are referred to as sustaining this view. The suggestions there made had reference to the measure of damages for an infringement by *making and using* a machine, and whether the rule of damages should, in such a case, be the price of the machine. In the case put, the mode which the patentee adopted to obtain his remuneration is not considered.

One patentee may choose to use his invention himself, and find his profits in the sale of its products; another may establish a royalty for the use of his patent; another sell his right out for designated portions of territory; and another exclusively manufacture and sell his machines, and seek his remuneration in the profits of such manufacture and sale.

The measure of damages, and the consequences of a recovery, should have some relation to the mode of remuneration adopted by the patentee, and to the nature of the injury inflicted by the infringement. Even the consequences of a recovery with respect to the subsequent rights of the parties, may be modified by the measure of damages adopted.

This was so held by Mr. Justice NELSON, in his charge to the jury in *Sickles v. Bordon* (3 Blatch. 536). If the principle stated in that case be correct, I think it decisive of this case. The learned justice stated to the jury, that "If the patentee has an established price in the market for his

Opinion of the Court--Sawyer, J.

[Aug.]

patent right, or, what is called a patent fee, that sum with the interest constitutes the measure of damages." He also stated, that the adoption of the patent fee as the measure of damages for infringement by the use of a machine, operates to vest in the defendant the right to use the machine during the term of the patent. (Id. 543, 545.)

This must be upon the principle, that the patentee has adopted a patent fee, or royalty, as one mode of remuneration, and in the fee has fixed his own measure of the value of the use of the machine for the entire term, or till that particular machine is worn out; and in case of an infringement the Court gives him his price, and the defendant having paid the full price, is entitled henceforth to the use of the machine.

If no patent fee has been adopted, then, generally, the patentee is entitled to recover the profits made in the use of the machine. A recovery of the profits for the use of the machine, does not vest the title in the defendant, for the recovery, based upon this rule of damages, can only be for the use of the machine prior to the recovery, and, ordinarily, does not cover the value of the use for the entire period over which the patent right extends, or the period during which the particular machine is capable of being used.

While the recovery of the established patent fee, covers the entire value, as fixed by the patentee himself, of the use for the entire term, and affords a complete compensation, the recovery of the profits for the use is but for a limited portion of the time, and but a partial compensation.

Different consequences, therefore, as to the subsequent rights of the parties, flow from the recovery in the two cases.

In the cases now under consideration, the patentee had fixed no patent fee, or royalty, nor was he using the invention itself, and deriving his profits from its use, and the sale of its products.

He manufactured and sold saws with his patent teeth inserted, or inserted teeth in saw-plates owned by other parties, or furnished his patent teeth to be inserted in the

1871.]

Opinion of the Court—Sawyer, J.

places of those already worn out, and he had his prices regularly fixed for his saws of various dimensions, for inserting teeth, and for teeth furnished. His compensation and profit consisted of the difference between the cost to him and those prices.

Of course, when he sells a saw with inserted teeth, or, inserts teeth in saw-plates owned by others, or furnishes teeth to be used in the places of those worn out, the parties purchasing by paying his price acquire a right to those specific teeth till they are worn out. (*Bloomer v. Millinger*, 1 Wal. 350.)

The profits made, therefore, are a full compensation fixed by the patentee himself, for the use of those specific teeth till they are worn out and incapable of further use.

He makes and sells to all who come, upon these terms. When, therefore, a party, has infringed by making and selling his patent-saw teeth, and he has claimed and recovered from the party making and selling, the profits which he would have received had he made and sold the teeth himself, he has received the full compensation for the use of those teeth, so long as they are capable of use, in the same manner and to the same extent, as he would have done had he made and sold them himself; and I do not perceive, why the same consequences should not follow, as in the instance of a recovery of the patent fee, in the case of an infringement, when a patent fee has been established. If so, then, a claim and recovery from Tucker and Putman of the profits, which Spaulding would have received, had he made and sold the teeth and saws himself, must vest the right to use those specific implements sold, in the vendees of Tucker and Putman—the several defendants in these cases.

It is said, however, that the patentee does not receive full compensation, when he is compelled to enforce his right by suit, instead of obtaining his profit by a voluntary sale, as the expenses of litigation are never fully recovered.

If there is anything in this position, it also applies with equal force to the case of a litigation to recover the patent fee, where one has been established.

The two cases stand upon the same principle. It is also said, that a party ought not to be compelled to make a sale against his will in seeking to enforce his rights upon the same terms, that he makes voluntary sales. It is one of the misfortunes incident to all violations of the rights of individuals, that the injured party is rarely compensated for all the expenses and vexations involved in an enforcement of his rights through legal proceedings. Patentees are not exceptions to this general rule.

But the complainant was not compelled to make a sale by the very act of seeking redress. If he was not satisfied to adopt the sales made by Tucker and Putnam, by seeking to recover the ordinary profits on the manufacture and sale of his invention, he could have omitted to seek such a judgment against them, confining himself to an injunction against them from future infringement, and then recover of their vendees the profits resulting from the use of the patented articles sold, so far as they had been used, and restrain their future use.

Either course was open to him. He had his choice of remedies, and chose to take judgment against Tucker and Putnam for the full profits on the manufacture and sale of the patented article, and by so doing, he adopted the same, and recovered, so far as the Court was able to ascertain from the evidence, the amount to which he was entitled, the full amount that he would have obtained had he made and sold them himself at his established prices, and by the claim and recovery, and by thus adopting the sale, the right to use the specific articles for which the recovery was had, vested in the vendees of Tucker and Putnam—the defendants in these actions.

The defendants are not shown to have used any saws or saw-teeth, other than those for which the recovery has been had against Tucker and Putnam.

Any other rule would enable the patentee to have a double recovery for the same thing: first, the full amount of the profits, as established by himself on the manufacture and sale—the mode of remuneration adopted by himself—and then the profits for the use of the same machine. The

1871.]

Opinion of the Court—Sawyer, J.

patentee is “entitled to but one royalty for a patented machine,” and he ought to have but one profit for the manufacture and use of a machine. (*Bloomer v. Millinger*, 1 Wal. 350.)

One English authority, *Penn v. Bibby* (3 Law Rep. Eq. Cases 309), seems to support the position taken by the complainant’s counsel; but it does not appear to accord fully with the view expressed by Mr. Justice NELSON in *Sickles v. Borden*. Perhaps a patentee would not be compelled, in a suit for infringement by the use of a patented machine, to accept the established patent fee as the measure of damages, instead of the profits derived from its use. It does not appear, in the case of *Sickles v. Borden*, whether the plaintiff insisted upon, or consented to, that rule or not. But if he does insist upon, or acquiesce in the rule laid down in that case, as the measure of damages, I do not see why the consequence stated by Mr. Justice NELSON should not follow.

In the case of *Spaulding v. Tucker and Putnam*, the complainant insisted that he was entitled to recover for the infringement in making and selling his invention, the full amount which he would himself have made on the articles sold, had he manufactured and sold them himself upon his own established terms. He gave evidence showing the price at which he sold, and the profits realized upon sales at those prices, and the Court adopted those profits as the measure of damages, and gave him the benefit of the rule, so far as the damages could be ascertained from the testimony.

After a careful consideration of the principles thus far recognized by the authorities, I have reached the following conclusion :

Where a patentee does not use the patented machine himself, nor establish a patent fee, but manufactures the patented article, and sells at fixed prices, seeking his compensation in the profits of the manufacture and sale at such fixed prices, and another party infringes the patent by making and selling the patented article; and where the patentee sues the party so infringing, and claims to recover,

Opinion of the Court—Hillyer, J.

[Oct.]

and does recover, the full amount of profits, which he himself would have obtained on said articles had he manufactured and sold them at his ordinary prices, by such claim and recovery, he adopts the sale made by the party infringing, and the right to use the specific articles so sold, and for which the recovery has been had, vests in the purchaser. The bill must be dismissed.

But under the circumstances, I think the defendants are not entitled to costs.

Let the bill be dismissed without costs to either party.

In re HOPE MINING COMPANY.

DISTRICT COURT, DISTRICT OF NEVADA,
OCTOBER 25, 1871.

1. CONSTRUCTION OF LIEN LAW OF NEVADA.—Hauling quartz to a quartz mill is “performing labor for carrying on the mill.” The lien is acquired by the performance of the work, and not by filing the notice, etc.
2. EFFECT OF REPEAL AFTER LABOR DONE.—The repeal of the law after the lien has attached, by performance of work, does not defeat the lien.
3. AMENDMENT OF CLAIM BY SETTING UP A SECURITY.—WHEN ALLOWED. Where a creditor, without any fraudulent intent, has, in ignorance of his rights, proved a secured claim as unsecured, he will be allowed to amend by setting up his security.

Before HILLYER, District Judge.

PETITION of a creditor in bankrupt proceeding for leave to amend proof of his claim by setting up lien.

M. S. Stone, for petitioner.

W. E. F. Deal, for respondent.

HILLYER, J. This is a petition filed by one J. A. Waddell for leave to amend the proof of his claim by setting out as security therefor a laborer's lien. Omitting such portions of the lien law as do not bear upon this case, it reads: “All persons performing labor for carrying on any

1871.]

Opinion of the Court—Hillyer, J.

mill shall have a lien on such mill for such work or labor done." (Statutes of Nevada, 1869, p. 61.) The mill upon which a lien is claimed, is one for crushing quartz and separating the precious metals therefrom, and the labor performed by petitioner was hauling quartz for the bankrupt to be crushed in this mill. This, it is said, is not "performing labor in carrying on the mill;" but I think it must be so considered. These laws always receive a liberal construction in favor of the laborer's lien. The labor of hauling quartz to a mill of this character is indispensable to carrying it on, and the language of the statute will not have to be strained in the least to include within its terms the person performing such labor.

Another point is made upon the repeal of the law. The labor in this case was performed while the laws of 1861 and 1869 were in force, and before the commencement of proceedings in bankruptcy; but the notice and account required by the statute to be filed with the County Recorder, were not filed until after the proceedings in bankruptcy were begun, and the laws of 1861 and 1869 had been repealed. On the fourth of March, 1871, the Legislature passed a law which embodied all the old laws in relation to mechanic's liens, extended their provisions to a few objects not before included, and repealed all former laws on the subject, without any clause saving rights acquired under those laws. It is now claimed that the lien of the petitioner was lost, because he failed to file his notice with the recorder before the repeal of the laws under which it accrued.

In the case of *Sabin v. Conner*, decided in this Court, and recently affirmed on appeal to the Circuit Court, it was held that the lien given by these statutes was acquired by the performance of the labor, and that filing the notice and bringing suit within the time prescribed, were merely means to be used to preserve the lien and make it available; that where as in this case the legislature had in one act consolidated all the old laws on the subject of mechanic's liens, and repealed the former laws, the new act was to be considered as substituted for and continuing in force the provisions of the old laws, rather than to have abrogated and

annulled them; citing *Steamship Co. v. Jolliffe* (2 Wal. 450) and *Wright v. Oakley* (5 Met. 400); and that if it were otherwise, it must be held that the effect of the repeal was to blot out the old laws "as completely as if they had never been enacted," and the repealing act itself would be void so far as it impaired the obligation of the defendant's contract by taking away from him all remedy for its enforcement. These principles are decisive in this case. The laws in force at the time the petitioner made his contract and performed the labor under it, were part of the contract. These laws gave him a lien upon the mill as a security for the wages of his labor, and when this lien is taken from him nothing of any value remains of the obligation of his contract. (*McCracken v. Hayward*, 2 How. 608; *Bronson v. Kinzie*, 1 How. 311; *Smith v. Morse*, 2 Cal. 524; *Quackenbush v. Danks*, 1 Denio, 128.)

But the assignee insists that, admitting the petitioner had a lien, he has waived and surrendered it by proving his claim without reference to his security, and he relies on the cases of *Stewart v. Isidor* (1 B. R. 129), and *In re Blass* (4 B. R. 37). In both of these cases the decision turned upon the language of the twenty-first section of the Bankrupt Act, which declares in express terms that a creditor, by proving his claim, discharges and surrenders all unsatisfied judgments, and proceedings commenced. This case arises under section twenty of the Act, which contains no language like that in section twenty-one. I presume that whenever it appears that a creditor has proved his secured claim as an unsecured one, intending thereby to share in the general assets and avail himself of his lien also, or with any other fraudulent intent, the Court will compel such creditor to surrender his lien to the assignee. But in this case, any presumption of fraud is entirely overcome by the facts. The petitioner proved his claim in ignorance of the existence of his lien, and as soon as he discovered the mistake, has asked leave to amend his proof. Intending no fraud and being mistaken as to his rights, the petitioner should not be held to have waived or surrendered his lien. (*In re Brand*, 3 B. R. 85; *In re Clark et al.*, 5 B. R. 255.)

The petition is granted.

1872.]

Opinion of the Court—Sawyer, J.

STEAMER SPARK v. LEE CHOI CHUM.

CIRCUIT COURT, DISTRICT OF CALIFORNIA,
FEBRUARY 29, 1872.

1. ALLOWANCE OF APPEALS FROM CHINA AND JAPAN.—In cases of appeal from the Consular and Ministerial Courts of China and Japan to the Circuit Court of the United States for the District of California, the record on appeal must show an allowance of the appeal.
2. APPEAL.—CITATION.—A citation is necessary unless the appeal is allowed in open Court. *Query*: whether a citation is not always necessary, if the Consular Court has once adjourned after rendering a decree, there being no terms of such Courts.
3. APPEAL IN NAME OF STEAMER VOID.—An appeal, or writ of error, in the name of a steamboat, or any other than that of a human being, or some corporate or associated aggregation of persons, cannot be sustained.
4. APPEALS IN FIRM NAME, INADMISSIBLE.—So, also, appeals in the name of a firm without stating the names of the individuals composing the firm, are nugatory.
5. WHO MAY APPEAL.—No one but a party, in some form, to the action can appeal, or can be heard in any stage of the proceedings in the Court below.
6. CLAIM.—PROCEEDINGS IN REM.—The party seeking to defend, in a proceeding *in rem*, in instance causes in Courts exercising admiralty jurisdiction, must file a claim to the property libelled.
7. WHO MAY FILE CLAIM.—RECITALS IN CLAIM.—The claim must be filed by the owner, or some authorized agent, and must state the facts in a direct issuable form, and not by way of recitals. Course of proceedings indicated.
8. CONSULAR COURTS.—LIMITED JURISDICTION.—JURISDICTIONAL FACTS.—The Consular Court is a Court of limited jurisdiction, and all the jurisdictional facts must be alleged in the libel or petition, otherwise it will be insufficient.

Before SAWYER, Circuit Judge.

MOTION to dismiss appeal from a decree of the Consular Court of Canton, in the Empire of China, in a case of collision.

Milton Andros, for appellant.

B. S. Brooks, for appellee.

SAWYER, Circuit Judge. This is an appeal from a judgment of the Consular Court of Canton, in the empire of

China, in a proceeding in admiralty against the Steamer *Spark*, for damages resulting from a collision with a Chinese junk owned by the petitioners, or libellants. The proceedings were had, and appeal taken, under the Act of Congress of June 22, 1860, and the amendatory Act of July 1, 1870, giving to this Court appellate jurisdiction in certain cases from the Consular and Ministerial Courts of China and Japan. (12 U. S. Stat. at L. 72; and 16 U. S. Stat. at L. 183-4.) The fifth section of the latter act, is as follows, to wit:

“SEC. 5. And be it further enacted, that where the matter in dispute, exclusive of costs, exceeds the sum of two thousand five hundred dollars, an appeal shall be allowed to the Circuit Court for the District of California; and upon such appeal a transcript of the libel, bill, answer, depositions, and all other proceedings in the cause shall be transmitted to the Circuit Court; and no new evidence shall be received on the hearing of the appeal; and the appeal shall be subject to the rules, regulations and restrictions prescribed in law for writs of error from District Courts of the United States.” A judgment having been entered by the Consular Court against the Steamer *Spark*, for the sum of \$6,005.32, an appeal has been taken on behalf of the defendant.

The appellees move to dismiss the appeal for numerous irregularities, only three or four of which will be noticed. It is objected, that the record shows no order allowing the appeal, and no citation to the appellees. The section cited, it will be seen, provides, that, “appeals shall be subject to the rules, regulations and restrictions prescribed in law for writs of error from District Courts of the United States.”

The twenty-second section of the Judiciary Act of 1789, provides, that final decrees and judgments of the District Courts in civil actions, “may be re-examined, and reversed or affirmed in a Circuit Court, * * * * * upon a writ of error, whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, assignment of errors and prayer for reversal, with a citation to the adverse party

1872.]

Opinion of the Court—Sawyer, J.

signed by the Judge of such District Court, or a Justice of the Supreme Court, the adverse party having, at least, twenty days notice." (1 U. S. Stat. at L. 84.) The same section has a similar provision for writs of error from the Supreme to the Circuit Court to review the judgments and decrees of the latter. And the twenty-fifth section has provisions in similar language for reviewing the decisions of the highest State Courts in certain cases by the Supreme Court of the United States. The construction of these latter provisions, and, consequently, the construction of the similar provision relative to writs of error from the Circuit to the District Courts, has been settled by the Supreme Court of the United States. Thus, in the very late case of *Gleason v. Florida* (9 Wal. 783), the Supreme Court say: "But on looking into the record, we find no allowance of the writ. And this has been repeatedly held to be essential to the exercise by this Court of reviewing jurisdiction over final judgments or decrees by the Courts of the States."

So, in *Hartford Fire Insurance Co. v. Van Duzer*, the writ was dismissed because no allowance of the writ appeared in the record, the Chief Justice, delivering the opinion of the Court, "that such allowance was indispensable to the jurisdiction of the Court in error to review the judgment of the highest Court of the State." (9 Wal. 784.) So, an appeal from the Supreme Court of the District of Columbia was dismissed by the Supreme Court of the United States, because there was "no evidence in the record of any allowance of appeal; and without an allowance this Court cannot acquire jurisdiction." (*Pierce v. Cox*, 9 Wall. 787; see, also, *Edmonson v. Bloomshire*, 7 Wall. 312.) This settles the construction of the Act of Congress relating to writs of error, and appeals from the United States District Courts, and as the same rules and regulations are made applicable to appeals from the Consular Courts of China, it settles the point in this case. The record shows no allowance of an appeal, and no citation, the latter being necessary also, if the order allowing an appeal is not made in open Court. This is implied, at least, from the case of *Pierce v. Cox* (*supra*), if a citation is not waived by appearance of the

appellee. And it is expressly required by the provisions of the statute quoted.

It is claimed, also, that this appeal, if taken at all, must have been taken out of Court, as the petition for an appeal bears date several days after the date of the judgment; and it is claimed, that there are no terms in the Consular Court, under the statute, and that as soon as judgment is entered, and the Court for that occasion has adjourned, it is no longer an open Court with reference to that case, and all subsequent allowances of appeals, must, necessarily, be made out of Court with respect to that case. Numerous authorities are cited to the point, but it is unnecessary now to determine it, upon the view taken, upon other objections. It will be the safer practice to issue and serve a citation.

Another formidable objection is, that no appeal has been taken in the case; that the appeal, if any there is, is taken in the name of the Steamer *Spark*—the only defendant in the case; and that no appeal can be taken in the name of an inanimate object—the *res* when the action is *in rem*.

The Supreme Court of the United States in the recent case of "*The Steamboat Burns*," held, that a writ of error, or appeal, cannot be sustained in the name of a steamboat, or any other than a human being, or some corporate, or associated aggregation of persons. (9 Wal. Rep. 237–40.) The writ of error was dismissed on the ground indicated.

The petition for an appeal in this case is entitled, *Lee Choi Chum, et al., plaintiff, v. The Steamer Spark, defendant*, and it proceeds. "And now comes the said defendant in the above entitled cause, by George B. Dixwell, his agent, and files this petition on appeal, and sheweth, that the said Consular Court did, on the twenty-fourth day of August, A. D. 1871, enter a judgment in the cause against the defendant, in favor of the plaintiff for the sum \$6,005 32, and the said defendant appeals from the judgment of the said Consular Court to the Circuit Court of the United States, for the District of California, etc. * * * Wherefore the defendant prays that proceedings," etc. This is an appeal by, and in the name of the ship and nothing more. The ship purports to be the appellant, and it is in fact the

1872.]

Opinion of the Court—Sawyer, J.

the only defendant in the case. The case cited is conclusive on this question. The petition for an appeal is signed, "Geo. Basil Dixwell, for self, and the firm of Augustine Heard & Co.," but this does not make either of these persons parties to the appeal, or even to the action. The body of the petition shows that it is, "the defendant in the above entitled cause by George B. Dixwell," that files the petition, but neither Dixwell nor Augustine Heard & Co., was a defendant.

They were not sued, and they never put in a claim as owner, or otherwise, so far as the record shows, and never filed any pleading in the case by which they became parties. They do not purport to appeal, nor were they in a condition to entitle them to appeal. If they had been parties, and had appeared as such in the name of "Augustine Heard & Co.," they would still be met by another decision of the Supreme Court, that an appeal in that name, style and form would be nugatory. In the case of "The Protector," an "appeal was dismissed" because taken in the name of "William A. Freeborn & Co.," without setting out the names of the parties constituting the firm, the Court holding, that "no difference existed between writs of error and appeals, as to the manner in which the names of parties should be set forth," and that this defect had always been held fatal in cases of writs of error. (11 Wall. 82.) But the appeal is not taken by these parties or any other, except "The Steamer *Spark*," the only defendant in the case.

In fact there is no other party to the record, and, consequently, none other, who could take the appeal. A person, who is not a party in some form, cannot interfere by way of appeal, or otherwise. There was, in this case, no answer to the libel or petition, as the parties designate the pleading filed by the complainants. There is no issue taken upon the allegations of the libel, or petition, and nothing to try except to ascertain the amount of damages. Neither Captain Brady, Mr. Orm, Mr. Dixwell, Augustine Heard & Co., nor any other person, presented himself in any such way as entitled him to be heard in the case, either in the Court below or on appeal. They have not merely failed in form,

but also in substance, to make themselves parties to the proceedings. It will be seen by reference to any reputable work on Admiralty Practice, that the first step in the defense in a proceeding *in rem* in instance causes in Courts exercising Admiralty jurisdiction, is, the interposition of a claim to the property libelled. The claim should be made by a party authorized to set up a defense—the owner, either in person, or by his agent, or by the agent of a foreign government, whose subjects are interested in the property in question. (Dunlap's Ad. Prac. 153; 2 Conkling's Ad. Pr. 543; Benedict's Ad. Pr. sec. 461.) "In such suits," observes Mr. Justice Story, "the claimant is an actor, and is entitled to come before the Court in that character only, in virtue of his proprietary interest in the thing in controversy; this alone gives him a *persona standi in judicio*. It is necessary that he should establish his right to that character, as a preliminary to his admission as a party *ad litem*, capable of sustaining the litigation. He is, therefore, in the regular and proper course of practice, required, in the first instance, to put in his claim upon oath, averring in positive terms his proprietary interest. If he refuses to do so, it is sufficient reason for a rejection of his claim. If the claim be made through the intervention of an agent, the agent is in like manner required to make oath to his belief of the verity of the claim; and if necessary, he may also be required to produce and prove his authority before he can be admitted to put in the claim. If this is not done, it furnishes matter of exception, and may be insisted upon by the adverse party, for the dismissal of the claim." (*United States v. 422 Casks of Wine*, 1 Peters' Reps. 549.)

The claim should state the facts showing the right of the party to intervene, that is to say, the ownership of the property, in a direct and issuable form. In the language of Mr. Benedict: "No set form of words is necessary to form a claim. In this, as in other pleadings, the Court looks to the substance, rather than the form. It must state, that the party is the true and *bona fide* owner of the interest which he represents, and that no other person is the owner thereof. It must be verified by the oath of the party or

1872.]

Opinion of the Court—Sawyer, J.

his agent or consignee; when it is verified by the oath of an agent or consignee, he must also swear that he is authorized to do so by the owner, or if the property be, at the time of the arrest, in the possession of the master of a ship, that he is a lawful bailee thereof for the owner." (Ben. Ad. Pr. sec. 461.) The document coming nearest to a claim, is a protest signed by George Brady. It does not purport to be a claim, and is not one, either in form or substance. It alleges nothing directly, or in an issuable form, as to the ownership of the vessel; but simply recites that, "whereas the said vessel was, on or about the twenty-fourth day of June, 1871, sold and transferred by the owner thereof unto the Hong Kong, Canton and Macao Steamship Company (limited) being a British Joint Stock Company, duly incorporated," etc., and then on behalf of said corporation, protests against the action and the exercise of jurisdiction by the consul, not on account of the insufficiency of the libel, but by reason of the said recitals.

The document, such as it is, is not verified. It is not a claim, in any sense, upon which the said corporation was entitled to defend, or be heard, had it attempted to do so. The owner of the ship in his own name in person, or by his agent, should have filed a claim in such a form, that issue could be taken on it, then if the facts had been admitted, or proved upon denial, the claimant would have been entitled to defend, and would have become a party to the action, and entitled to act as such in all subsequent proceedings. The mere putting in of a claim is not a defense to the action, but it gives the claimant the *status* of a party. This is its office. After putting the claim in, and thus becoming entitled to be heard for his interest, the claimant must put before the court the grounds of his defense, in suitable allegations, so that the court, and the opposite party, may be informed of the grounds of the defense. (Benedict's Ad. Pr. sec. 465, *et seq.*)

The Consular Court is a court of limited jurisdiction, and all the jurisdictional facts must be alleged in the libel, petition or complaint, otherwise it will be insufficient. If the libel or petition fails to show the facts which authorize the

court to take jurisdiction under the statute, or if, for any other reason, it fails to appear upon the facts stated in the libel, or complaint, that the party filing is not entitled to any relief, the claimant after filing his claim, and becoming a party to the proceeding, may file exceptions in the nature of a special demurrer, pointing out the particulars in which the libel or petition fails to show jurisdiction or any ground for relief. Or if there is no defect in the libel or petition, and the matters showing a want of jurisdiction, or other defense do not appear on the face of the libel, they must be set up by direct affirmative allegations in an issuable form, by way of plea, or answer. The claims, exceptions, and other matters of defense, however, may be united in the answer, at the option of the party intervening for the protection of his own interest; but this is not the best practice. (Benedict's Admiralty Practice, chapter XXVI; Dunlap's Admiralty. Pr., chap. VI and VIII; 2 Conklin's Admiralty Prac. 577, *et seq.*) I have been thus particular in referring, briefly, to the practice, and to the works, where the proper practice in cases of this kind may be readily found, for the reason that the proceedings in this class of cases do not appear to be well understood by litigants at Canton, and the proceedings in this case, have, consequently been very irregular. This is probably owing to the scarcity of books, and the absence of members of the legal profession at Canton. By consulting some one, or more of the works referred to, the mistakes, that have occurred in this case may be avoided in the future. As the jurisdiction conferred upon Consuls is highly important, the importance of procuring some reputable works on Admiralty Practice cannot be overestimated.

On the view taken, the court has not acquired jurisdiction of the case, and, of course, any inquiry into the merits is precluded. I feel it my duty, however, to suggest, that the libel or petition itself appears to be defective, in not stating the facts necessary to give the Consular Court jurisdiction under the Acts of Congress, and the treaty between the United States and the Empire of China. It is nowhere alleged in the petition, or libel, that The Steamer *Spark*, is an

1872.]

Opinion of the Court—Sawyer, J.

American vessel, nor are any facts alleged, by which it can be seen, that the Consular Court has jurisdiction.

The jurisdictional facts as before mentioned, must all be distinctly averred.

It appears from what has been said, and from the authorities cited, that no claimant of the ship appears in the record in any form that entitles him to be heard; that there is no party defendant, other than the ship—the *rem*—and no appeal taken in any form by any party appearing to be entitled to appeal, or in any name other than that of the ship, also, that no appeal can be taken in the name of the ship alone. There is, therefore, no valid appeal, and the appeal must be dismissed. So, also, the record fails to show any allowance of an appeal, or any citation to the adverse party, and it is not suggested, that there is any diminution of the record in these particulars. There being neither an allowance of the appeal, nor a citation disclosed by the record, the fact of the existence of the one cannot be inferred from the other. There are numerous other subordinate points made which I do not find it necessary to discuss.

Let the appeal be dismissed with costs.

INDEX.

ABSCONDING DEBTOR.

1. **ARREST OF DEBTOR.—TIME WITHIN WHICH TO CHARGE BODY IN EXECUTION.**—A creditor who has caused the provisional arrest of an absconding debtor under section 106 of the Code (Or. Code, 164) has until the time allowed for a return of an execution against property to charge the body of such debtor in execution. *Norman v. Manciette*, 484.
2. **ABSCONDING DEBTOR, WHO IS.**—An absconding debtor is one who is about to leave the State, either openly or secretly, with intent to hinder, delay or defraud his creditors of their just debts. *Id.*
3. **IDEM.**—A debtor who is about to remove from this State without the consent of his creditors and without a mind to return, is presumed to be acting with such intent, and *prima facie* he is an absconding debtor.
4. **CONSTITUTIONALITY OF LAW TO ARREST AND IMPRISON.**—The Legislature has power to authorize the arrest and imprisonment of such a debtor so as to enable his creditors to enforce the establishment and collection of their debts by legal proceedings in the tribunals of this State. *Id.*
5. **ACTION FOR FALSE IMPRISONMENT.**—There can be no recovery in an action for false imprisonment when it appears that the affidavit on which the defendant procured the arrest of the plaintiff is sufficient on its face, because then there is no trespass; and if the affidavit be false, the action must be for malicious prosecution, in which both malice and want of probable cause must be alleged and proved. *Id.*
6. **PROBABLE CAUSE.—DAMAGES.**—In an action for false imprisonment, the question of probable cause is only material in mitigation of damages. *Id.*

ACCIDENT,

See WASTE, 6.

ADMIRALTY.

1. **ADMIRALTY.—DOMESTIC MATERIAL MEN.—MORTGAGE.**—The lien of domestic material men will be enforced against proceeds in the registry in preference to the demand of a subsequent mortgage of the vessel, notwithstanding that since the repeal of the 12th rule in Admiralty, such liens cannot be enforced in this Court by a proceeding *in rem*, nor in the State Courts by any proceeding which involves the exercise of admiralty jurisdiction. *Francis v. Barque Harrison*, 353.
2. **UNJUST AND UNEQUAL AGREEMENTS WITH SEAMEN DISREGARDED BY COURT OF ADMIRALTY.**—An agreement made between the master and the cook

- of a fishing vessel by which the latter agreed to renounce his wages, earned and to be earned, and to accept in lieu thereof the *catch* of one of the seamen, pronounced unequal and unjust and to be disregarded by a Court of Admiralty. *Somerville v. Brig Francisco*, 390.
3. **IN ADMIRALTY.—ANSWERS.**—The general answer in admiralty should be pertinent and responsive to the narration or allegations in the articles of the libel, and if the response is not full, explicit and distinct, exceptions for insufficiency lie to compel a sufficient answer. *In re The California*, 463.
 4. **SAME.**—But if the answer is responsive to the libel, no exceptions will lie to it, on the ground that it is not a defense to the suit, whether the matter is impertinent or not. *Id.*
 5. **EXCEPTIONS.**—Exceptions is admiralty, nature and office of, defined.
 6. **IMPERTINENCE.**—It is impertinence to blend matter intended as a defensive allegation, with the response or answer to an allegation of the libel.
 7. **HALF PILOTAGE LIEN ON VESSEL MAY BE ENFORCED IN ADMIRALTY.**—The State statute gives a pilot half pilotage as a compensation for tendering his services to pilot a ship out over the Columbia river bar, in case the same are refused: *Held*, that such a claim is a claim for pilotage, which by the general maritime law, is a lien upon the vessel, and the same may be enforced by a suit in admiralty. *Id.*
 8. **IMPRISONMENT FOR DEBT IN ADMIRALTY SUITS.**—The act of March 2, 1867 (14 Stat. 543), adopting the State law concerning "modifications, conditions and restrictions upon imprisonment for debt" does not apply to process in admiralty suits. *Hanson v. Fowle*, 497.
 9. **IDEM.**—The act of August, 23, 1842 (5 Stat. 517), gave the Supreme Court full authority to regulate the process and forms of proceedings in suits of admiralty, and it will not be presumed that Congress intended to change the rule prescribed by that Court upon the subject of imprisonment on process in admiralty and adopt the State law, unless it is explicitly so provided. *Id.*
 10. **CLAIM FOR DAMAGES FOR INJURY TO PERSON NOT A CLAIM FOR A DEBT.**—An action to recover damages for an injury to the person with force, is not an action to recover a debt, and the claim for such damages is not a claim for a debt, within the meaning of that term as used in the act of 1867 (Ad. Rule 48, or Sub. 19 of Art 1 of the State Constitution)—at least until it is changed or merged in a judgment for a sum certain. *Id.*
 11. **AT COMMON LAW.**—At common law, a *capias* lay, both before and after judgment in actions for injuries committed with force, but not otherwise, until the statute of Marlbridge (52 Hen, III. C. 23, and Westminster 2, 13 Edw. I. C. 11, etc). *Id.*
 12. **ACT JULY 6, 1862, CONSTRUCTION OF.**—The act of July 6, 1862 (12 stat. 588), only extends the thirty-fourth section of the judiciary act to cases in equity and admiralty, and does not include criminal actions or proceedings. *United States v. Brown*, 531.
 13. **ALLOWANCE OF APPEALS FROM CHINA AND JAPAN.**—In cases of appeal from the Consular and Ministerial Courts of China and Japan to the Circuit Court of the United States for the District of California, the record on

appeal must show an allowance of the appeal. *Steamer Spark v. Lee Choi Chum*, 713.

14. **APPEAL.—CITATION.**—A citation is necessary unless the appeal is allowed in open Court. *Query*: whether a citation is not always necessary, if the Consular Court has once adjourned after rendering a decree, there being no terms of such Courts. *Id.*
15. **APPEAL IN NAME OF STEAMER VOID.**—An appeal, or writ of error, in the name of a steamboat, or any other than that of a human being, or some corporate or associated aggregation of persons, cannot be sustained.
16. **APPEALS IN FIRM NAME, INADMISSIBLE.**—So, also, appeals in the name of a firm without stating the names of the individuals composing the firm, are nugatory. *Id.*
17. **WHO MAY APPEAL.**—No one but a party, in some form, to the action can appeal, or can be heard in any stage of the proceedings in the Court below. *Id.*
18. **CLAIM.—PROCEEDINGS IN REM.**—The party seeking to defend, in a proceeding *in rem*, in instance causes in Courts exercising admiralty jurisdiction, must file a claim to the property libelled. *Id.*
19. **WHO MAY FILE CLAIM.—RECITALS IN CLAIM.**—The claim must be filed by the owner, or some authorized agent, and must state the facts in a direct issuable form, and not by way of recitals. Course of proceedings indicated. *Id.*
20. **CONSULAR COURTS.—LIMITED JURISDICTION.—JURISDICTIONAL FACTS.**—The Consular Court is a Court of limited jurisdiction, and all the jurisdictional facts must be alleged in the libel or petition, otherwise it will be insufficient. *Id.*

See JURISDICTION, 3, 4, 5.

ALCALDE GRANTS.

1. **ALCALDE GRANTS.**—An Alcalde of the Pueblo of San Francisco, in 1846, had no authority to revoke a grant once made by him and delivered; or to mutilate its record. A mutilation of a record by him did not operate to divest a title already passed to the grantee. *Montgomery v. Bevans*, 653.
2. **ABSENCE.—PRESUMPTION OF DEATH.**—When a party has been absent seven years without being heard of, the presumption of law then arises that he is dead. But when a party is once shown to be alive, the presumption of law is that he continues alive until his death is proved, or the rule of law applies by which such death is presumed to have occurred, that is, at the end of seven years. This presumption of life is received in the absence of any countervailing testimony, as conclusive of the fact establishing it for the purpose of determining the rights of parties as fully as the most positive proof. The only exception to the operation of this presumption is when it conflicts with the presumption of innocence, in which case the latter prevails. *Id.*
3. **LIFE PRESUMPTIONS.**—The presumption of the continuance of life rebutted in this case by evidence tending to show that the absent party met his death soon after his disappearance. *Id.*

4. GRANT TO PARTY DECEASED.—A grant of land in the Pueblo of San Francisco, by an Alcalde in 1846 to a person deceased, is void. *Id.*
5. SAN FRANCISCO TITLE TO PUEBLO LANDS.—The city of San Francisco presented her claim for confirmation to the Board of Land Commissioners created under the act of Congress of March 3, 1851; the Board confirmed the claim to a portion of the land, and rejected it for the remainder; an appeal was taken by the city from this decision to the District Court of the United States; the case was then transferred to the Circuit Court of the United States for the district of California; and by that Court a decree was rendered May 18, 1865, confirming the claim of the city to four square leagues of land, subject to certain reservations and exceptions therein mentioned. From this decree an appeal was taken to the Supreme Court of the United States, and whilst the case was pending there, Congress passed the Act of March 8, 1866, "to quiet the title to certain lands within the corporate limits of the city of San Francisco," by which act all the right and title of the United States, to the land situated within the corporate limits of the city, confirmed by the decree of the Circuit Court, were relinquished and granted to the city, and the claim of the city to the land was confirmed, subject, however, to the reservations and exceptions designated in the decree, and upon certain trusts as to the disposition of the land: *Held*, That by this act the Government determined the conditions upon which the claim of the city should be recognized and confirmed, and that the title of the city, therefore, rests upon the decree of the Circuit Court, as modified by the Act of Congress—that is, her title is that which is recognized and established by the decree as thus modified. The decree must be read precisely as if the conditions prescribed in the Act of Congress had been inserted in the decree by the Court. *Id.*
6. *IDEM.*—CHARACTER OF TITLE.—The claim of the city of San Francisco, as successor of the Pueblo, to her municipal lands, was founded upon the general laws of Mexico, by which pueblos, or towns, once established and officially recognized, were entitled for their benefit, and the benefit of their inhabitants, to the use of lands embracing the site of such pueblos, or towns, and of adjoining lands within certain limits. No assignment of these lands having been made to the pueblo under the former Government, the claim or right of the city was an imperfect one, requiring recognition and confirmation in the mode prescribed by Congress, like other claims to property of an imperfect character derived from Spanish or Mexican authorities. *Id.*
7. *IDEM.*—GRANT UNDER ACT OF CONGRESS, 1864.—By the fifth section of the Act of Congress of July 1, 1864, "to expedite the settlement of titles to lands in the State of California," all the right and title of the United States to the lands within the limits of the city, as defined by its charter of 1851, were granted to the city for the uses and purposes specified in the Van Ness Ordinance, subject to certain exceptions designated. These exceptions consisted of all sites or other parcels of land which had been, or were then, occupied by the United States for military, naval, or other public uses, or such other sites or parcels as might thereafter be designated by the President within one year after the rendition to the General Land Office by the Surveyor-General of an approved plat of the exterior

limits of the city, as recognized by the section, in connection with the lines of the public surveys: *Held*, That the exception from the grant of such parcels as might be subsequently designated by the President, did not defeat the entire grant; and that if the exception were not void for repugnancy, the title of the United States to the lands specified must be regarded as having passed by the Act to the city with a right in the United States to resume the titles to parcels upon the designation of the President within a specified period. *Id.*

8. **IDEM.—VAN NESS ORDINANCE.**—The adverse interest of the Government to the lands within the corporate limits of 1851 being released by the Act of July 1, 1864, the titles conferred by the Van Ness Ordinance became perfect legal titles. The act operated upon such titles as effectually as a patent would have done, and the right reserved to the United States did not affect the perfect character of those titles. *Id.*

9. **IDEM.—STATUTE OF LIMITATIONS OF 1863.**—The sixth section of the State Statute of Limitations of 1863, providing in substance that parties claiming real property under title derived from the Spanish or Mexican Governments, or the authorities thereof, which had not been finally confirmed by the United States, or its legally constituted authorities, shall be limited to five years after its passage, within which to bring an action for the recovery of the property or its possession, but if the title had been thus finally confirmed, the parties shall be subject to the same limitations as though they derived their title from any other source, that is, shall have five years from such final confirmation, is invalid so far as it applies to actions for the recovery of real property founded upon titles derived from Mexican or Spanish authorities, perfected after its passage, either by Act of Congress or by judicial decree, survey and patent, and that, as to titles thus perfected, the ordinary period of limitation must be allowed from the date of their consummation, which exists with reference to actions on complete titles from other sources. *Id.*

10. **MEXICAN GRANTS, LEGISLATION AFFECTING.**—The Act of Congress of March 3, 1851, passed in execution of the obligation of the United States, under the stipulations of the treaty by which California was ceded, to protect the holders of titles derived from Mexican or Spanish authorities, is not subject to any constitutional objection, so far as it applies to titles of an imperfect character; that is, to titles which require further action of the political department of the Government to render them perfect; and the action of the Government under this Act, and the rights of possession and enjoyment which the title perfected, thereby gives, cannot be defeated or impaired by any State legislation. *Id.*

APPEAL.

1. **ALLOWANCE OF APPEALS FROM CHINA AND JAPAN.**—In cases of appeal from the Consular and Ministerial Courts of China and Japan to the Circuit Court of the United States for the District of California, the record on appeal must show an allowance of the appeal. *Steamer Spark v. Lee Choi Chum*, 713.

2. **APPEAL.—CITATION.**—A citation is necessary unless the appeal is allowed in open Court. *Query*: whether a citation is not always necessary, if the Consular Court has once adjourned after rendering a decree, there being no terms of such Courts. *Id.*

3. **APPEAL IN NAME OF STEAMER VOID.**—An appeal, or writ of error, in the name of a steamboat, or any other than that of a human being, or some corporate or associated aggregation of persons, cannot be sustained. *Id.*
4. **APPEALS IN FIRM NAME, INADMISSIBLE.**—So, also, appeals in the name of a firm without stating the names of the individuals composing the firm, are nugatory. *Id.*
5. **WHO MAY APPEAL.**—No one but a party, in some form, to the action can appeal, or can be heard in any stage of the proceedings in the Court below. *Id.*

ARREST.

See **ABSCONDING DEBTOR**, 1-6; **ADMIRALTY**, 8, 9, 10, 11.

ASSAYER.

1. **WHO LIABLE AS ASSAYER.**—A mining company not assaying for others, but assaying its own ores, on its own account only, and not assaying any bullion or amalgam, is required to pay a special tax as assayer, under subdivision forty-eight of section seventy-nine of the Internal Revenue Act of June 30, 1864, as amended in 1866. *Y. J. S. M. Co. v. Gage*, 494.

ATTACHMENT.

1. **BANKRUPTCY.—DISSOLUTION OF ATTACHMENT.**—An adjudication in bankruptcy relates to the filing of the petition, and works a dissolution of an attachment before then levied upon the bankrupt's goods from that date. *Zeiber v. Hill*, 268.
2. **KEEPER'S FEES ON DISSOLUTION OF ATTACHMENT.**—Where a debtor was adjudged a bankrupt on his own petition, and prior to the filing thereof a flock of sheep belonging to him had been taken on an attachment and kept by the officer until delivered to the assignee: *Held*, that such officer is entitled to a compensation from the assignee for keeping such sheep, until claimed and received by the assignee. *Id.*

BANKRUPTCY.

1. **BANKRUPT, EMPLOYMENT OF, BY BAILEE.**—Where a bailee of an insolvent debtor's goods, prior to the filing of a petition in bankruptcy against such debtor, employed him to assist in the sale and management of such goods: *Held*, that such employment was not illegal and that the bailee, as against the assignee in bankruptcy, was entitled to a credit for the amount paid therefor. *Catlin, Assignee v. Foster*, 37.
2. **BAILEE ENTITLED TO CREDIT FOR SERVICES.**—Where a bailee of an insolvent debtor's goods bestowed labor upon and about them, with a knowledge that such debtor had committed an act of bankruptcy in making such bailment, he is entitled to a credit for the value of such services as against the claim of the assignee in bankruptcy for such goods or their value.
3. **MUTUAL DEBTS OR CREDITS.**—What is a case of mutual debts or credits within the meaning of Section 20 of the Bankrupt Act? *Id.*
4. **ORDER EXPUNGING CLAIM WILL NOT PREVENT ITS BEING PLEADED AS SET-**

off.—An order expunging a claim against the estate of a bankrupt, is not such an adjudication thereof as prevents the creditor from pleading it as a set-off in an action by the assignee for a claim due such estate. *Id.*

5. CONDITIONS PRECEDENT TO ACTION BY CREDITOR.—*Semble*, that the proof of a debt before the register and the rejection thereof by the District Court, and the appeal therefrom to the Circuit Court, are conditions precedent to the creditor's right to maintain an action against the assignee for the recovery of his debt, but do not constitute or have the effect of an adjudication upon or against such claim. *Id.*
6. DEFENCES SEPARATELY PLEADED.—Distinct defenses to a petition in bankruptcy should be separately pleaded. *In re Ouimette*, 47.
7. SURPLUSAGE.—A denial of the allegation in the petition respecting the insolvency of the respondent is a sufficient answer thereto, and a further statement as to the value of respondent's assets compared with the amount of his indebtedness, is surplusage and immaterial. *Id.*
8. DEMURRER—MOTION TO STRIKE OUT.—A demurrer is not the proper mode of objecting to irrelevant or immaterial allegations, or the mingling in one plea of distinct defenses, but a motion to strike out. *Id.*
9. DEFENSES MUST BE SEPARATELY PLEADED.—In a petition in bankruptcy, the debt and the act of bankruptcy constitute the cause of action, and the defense thereto may go to either or both of these matters, but if there are several defenses they must be separately pleaded. *Id.*
10. TENDER NO DEFENSE TO PETITION IN BANKRUPTCY.—A plea of tender can under no circumstances be a defense to a petition to have a debtor adjudged a bankrupt. *Id.*
11. PROMISSORY NOTE, WHEN NOT PAYMENT.—The mere delivery and receipt of the promissory note of the debtor or a third person does not constitute payment, but it must also appear that the creditor *expressly* agreed to take such note as payment. *Id.*
12. SAME.—Where a creditor took the promissory notes of a third persons from his debtor upon an agreement that they should be considered as taken in payment, if *collectable*, such creditor is bound to use ordinary means and diligence to collect such notes, and, if necessary, he must sue upon them. *Id.*
13. PETITION, WHO MAY MAINTAIN.—A creditor whose debt is provable in bankruptcy, though not due, may maintain a petition to have his debtor declared a bankrupt. *Id.*
14. DISPOSITION OF PROPERTY BY DEBTOR AFTER PETITION IN BANKRUPTCY NOT A PREFERENCE.—A payment or other disposition of property by a debtor after petition in bankruptcy filed against him, is not a preference within the meaning of Sections 23, 35 and 39 of the Bankrupt Act, but simply an unlawful meddling with the property of the assignee, and therefore a nullity. *In re Randall*, 56.
15. WHAT CONSTITUTES A PREFERENCE.—What constitutes a preference under the Bankrupt Act, and where the taking of a preference will work a forfeiture of the debt of the creditor taking the same. *Id.*
16. OBJECTION TO PROOF OF DEBT.—BY WHOM MADE.—Objection to the proof

- of debt must be made by the assignee, unless the Court for cause otherwise directs. *Id.*
17. PROOF OF CLAIM.—PARTICULARS.—Upon proof of a claim in bankruptcy, the particulars of the consideration must be stated in the deposition. *In re Elder*, 73.
 18. COIN DEMAND.—A demand by its terms, payable in gold coin, should be proved according to its terms. *Id.*
 19. FRAUDULENT PREFERENCE.—Where a creditor has attempted to obtain a preference over other creditors, by fraudulently increasing the amount of his claim, the whole claim will be rejected. *Id.*
 20. STATUTE CONSTRUED.—Section 22. Bankrupt Act of 1867, construed. *Id.*
 21. DISTRICT COURT IN BANKRUPT PROCEEDINGS MAY RESTRAIN EXECUTION OF PROCESS OF STATE COURT.—The District Courts of the United States, sitting in bankruptcy, have power to restrain, by injunction, the Sheriff of a State Court from proceeding to sell the property of a voluntary bankrupt, under an execution issued out of a State Court upon a judgment obtained before the commencement of proceedings in bankruptcy. *In re Mallory*, 88.
 22. JUDGMENT LIEN, WHEN DECLARED VOID.—It has also the power to declare the lien of a judgment of a State Court void, as against the general creditors, if such lien is an unlawful preference under the Bankrupt Act. *Id.*
 23. JUDGMENT LIEN LIQUIDATED IN BANKRUPTCY.—The lien of a judgment, like other liens, is to be ascertained and liquidated in the Bankruptcy Court. *Id.*
 24. SECTION 1 of the Bankrupt Act of 1867, construed. *Id.*
 25. BANKRUPTCY.—CREDITORS' PETITION MAY BE AMENDED.—Where the proofs disclose acts of bankruptcy not averred in the petition of the creditor, the petition may be amended so as to conform to the proofs. *In re Gallinger*, 224.
 26. RESIDENCE OR PLACE OF BUSINESS MUST BE WITHIN DISTRICT TO GIVE COURT JURISDICTION.—Where a petition had been filed against certain parties praying that they be adjudged bankrupts, and on the return day they appeared and with their own consent were so adjudged; and subsequently another creditor moved the Court to dismiss the proceeding on the ground that the bankrupts had never resided or carried on business in this State: *Held*, that the Court was without jurisdiction and that the proceedings should be vacated and set aside. *Fogarty v. Gerrity*, 233.
 27. BANKRUPTCY, WHEN JUDGMENT VOID.—A judgment taken contrary to the bankrupt act is not void unless a petition in bankruptcy is filed by or against the debtor within six months from the entry of the judgment. *In re Fuller*, 243.
 28. IDEM.—A judgment by confession is not void under the code for want of a sufficient statement of the facts out of which the indebtedness arose, except as to creditors who have acquired a lien upon the debtor's property before a sale upon the confessed judgment. *Query*, whether such judgment is even then void if it can be shown by evidence *aliunde*, that the judgment was in fact given in good faith and for an actual debt.

-
29. **CREDITORS OF BANKRUPT WHEN NOT ENJOINED.**—The District Court has jurisdiction to ascertain and liquidate all liens upon the bankrupt's property, and in the exercise of this jurisdiction may enjoin a creditor from enforcing a judgment in a State Court against the property of the bankrupt, but after the process of the State Court has been executed by a sale of property, the District Court will not interfere.
30. **STIPULATION IN JUDGMENT AS TO INTEREST.**—A stipulation in a judgment that the interest on it shall bear interest if not paid annually, is void and does not make such judgment usurious.
31. **BANKRUPT.—FRAUDULENT CONVEYANCE BY.**—Judgment in favor of the assignee for the value of property conveyed to an alleged creditor of the bankrupt, notwithstanding that the conveyance was made more than six months before the commencement of the proceedings in bankruptcy, it appearing that the conveyance was fraudulent and intended to cheat and hinder creditors. *Hyde v. Sontag*, 249.
32. **BANKRUPTCY—JURISDICTION OF ORDINARY TRIBUNALS.**—The ordinary tribunals are not deprived, by mere force of an adjudication in bankruptcy, of jurisdiction over suits against the bankrupt. The proceedings in such suits may be arrested or controlled by the Bankruptcy Court, when necessary for the purposes of justice; but in the absence of such interference, the jurisdiction of the ordinary tribunals remains unimpaired and their judgments are valid. *In re Davis*, 260.
33. **BANKRUPTCY—DISSOLUTION OF ATTACHMENT.**—An adjudication in bankruptcy relates to the filing of the petition, and works a dissolution of an attachment before then levied upon the bankrupt's goods from that date. *Zeiber v. Hill*, 268.
34. **OFFICER'S FEES.**—An officer must look to the party, or his attorney, who employed him for his fees; he has no claim upon the adverse party. *Id.*
35. **DUTY OF REGISTER AS TO BANKRUPT'S PROPERTY.**—Where a debtor is adjudged a bankrupt upon his own petition, it is the duty of the register to take his property into his custody by the intervention of an agent, or other proper means. *Id.*
36. **KEEPER'S FEES ON DISSOLUTION OF ATTACHMENT.**—Where a debtor was adjudged a bankrupt upon his own petition, and prior to the filing thereof a flock of sheep belonging to him had been taken on an attachment and kept by the officer until delivered to the assignee: *Held*, that such officer is entitled to a compensation from the assignee for keeping such sheep, until claimed and received by the assignee. *Id.*
37. **BANKRUPTCY.—SUIT AGAINST BANKRUPT IN STATE COURT.**—On an application for leave to sue the bankrupt in a State Court, the Court will not enter upon the inquiry, whether the debt be one from which the bankrupt would be relieved by his discharge; but *semble*, that, upon a special showing that the right of the creditor might be lost if a suit were not forthwith commenced, the Court might allow the suit to be brought and prosecuted so far as might be necessary to save rights. *In re Ghirardelli*, 343.
38. **JURISDICTION OF REGISTER.**—Where a petition in bankruptcy is filed in the name and on behalf of a corporation without proper authority, the Register acquires no jurisdiction to adjudge the corporation a bankrupt. *In re Lady Bryan Co.*, 349.

39. **AUTHORITY, WHAT.**—Under the provisions of the thirty-seventh section of the Bankrupt Act, the filing of a petition on behalf of a corporation, can only be “duly authorized by a vote of the majority of the corporators at any legal meeting called for the purpose.” *Id.*
40. **WHO ARE CORPORATORS.**—A “corporator,” within the meaning of the Act, is one of the constituents or stockholders of the corporation. *Id.*
41. **TRUSTEES CANNOT AUTHORIZE.**—Although the management of the affairs of a corporation is committed by the laws of the State to a Board of Trustees, such Board cannot authorize the filing of a petition in bankruptcy, under an Act of Congress, devolving that authority upon a majority of the corporators to be exercised at a meeting called for the purpose. *Id.*
42. **ORDER OF REGISTER VACATED.**—Where the Register in bankruptcy adjudged a corporation to be a bankrupt upon a petition filed upon the authority of the Board of Trustees, the adjudication was set aside by the District Court on petition of an attaching creditor, and this action affirmed by the Circuit Court. *Id.*
43. **SUBSEQUENT RATIFICATION.**—A ratification of the action of the Trustees and the Register by the stockholders, after the adjudication in such case, does not cure the defect of want of jurisdiction of the Register at the commencement of proceedings, and at the time of the adjudication. *Id.*
44. **SURVIVING PARTNER ADJUDGED BANKRUPT.**—A surviving partner will be adjudged bankrupt on an act of bankruptcy committed by him in the course of the administration of the assets of the dissolved partnership, notwithstanding that the separate estate of the deceased partner is sufficient to pay all his debts, joint and separate. *In re Stevens*, 397.
45. **JOINT ASSETS TO BE TAKEN POSSESSION OF.**—The messenger will in such case take possession of the joint assets in the hands of the bankrupt surviving partner, and also of his separate property. *Id.*
46. **CONGRESS HAS FULL POWER OVER SUBJECT OF BANKRUPTCIES.**—The Constitution gives Congress full power over “the subject of bankruptcies” in the United States, and in the enactment of laws on this subject, Congress is not limited to the scope or details of the bankrupt acts in force in England at the time of the formation and adoption of the Constitution; the subject is committed to the wisdom and discretion of the Legislature, with the one qualification that its laws shall be uniform in their operation throughout the United States. *In re Silverman*, 410.
47. **BANKRUPT ACT.—POLICY OF.**—The property of an insolvent debtor represents in whole or part the credit given him by his creditors, and in good morals belongs to them, and the Bankrupt Act, which, under certain circumstances, evincing bad faith upon the part of the insolvent, compels a distribution of such property among the creditors, in proportion to their debts, is a wise and just measure. *Id.*
48. **IN BANKRUPTCY COURT ALL PLEADINGS SPECIAL.**—In this Court all pleadings must be special, and therefore a mere general denial of the intent with which an act is alleged to have been done, is not a good defense to a charge of having committed an act of bankruptcy, but the respondent must also allege and prove with what intent he did the act complained of. *Id.*

49. **GENERAL DENIAL OF UNLAWFUL INTENT, WHEN SUFFICIENT.**—But when the act]complained of is not necessarily an an act of bankruptcy, a general denial of the unlawful intent with which the act is alleged to have been done, is sufficient to prevent judgment for want of an answer, and upon a trial, evidence of a lawful intent may be given thereunder. *Id.*
50. **WHEN NOT SUFFICIENT.**—When the unlawful intent is the necessary consequence of the act charged, as in the case of a payment of one creditor by an insolvent debtor, with knowledge of his insolvency, a mere denial of such intent is no answer to the petition, and judgment may be given against the respondent as upon a failure to answer. *Id.*
51. **CONSTRUCTION OF LIEN LAW OF NEVADA.**—Hauling quartz to a quartz mill is “performing labor for carrying on the mill.” The lien is acquired by the performance of the work, and not by filing the notice, etc. *In re Hope Mining Co.*, 710.
52. **EFFECT OF REPEAL AFTER LABOR DONE.**—The repeal of the law after the lien has attached, by performance of work, does not defeat the lien.
53. **AMENDMENT OF CLAIM BY SETTING UP A SECURITY.**—WHEN ALLOWED. Where a creditor, without any fraudulent intent, has, in ignorance of his rights, proved a secured claim as unsecured, he will be allowed to amend by setting up his security.
54. **BANKRUPTCY.—TORTIOUS ACTS OF ASSIGNEE.**—The estate of a bankrupt is not answerable for the tortious acts of the assignee. *Adams v. Meyers*, 306.
55. **GOODS OF TWO PARTIES MIXED BY MUTUAL CONSENT.**—When the wheat of two parties is intermixed and confused, by mutual consent they became owners in common of the grain so mixed in proportion to their respective shares of the bulk or quantity. *Id.*
56. **IDEM.—BY ONE WITHOUT CONSENT OF THE OTHER.**—When the goods of two parties are mixed by one without the consent of the other, if they be grain or other articles, of equal value, the other party is only entitled to his proportionate share of the common quantity. *Id.*

BAR TO ACTION.

See RES ADJUDICATA; EJECTMENT, 15; JUDGMENT AND DECREE, 1.

BILL OF LADING.

See EVIDENCE, 1.

BURDEN OF PROOF.

See EVIDENCE, 2.

CENTRAL PACIFIC RAILROAD COMPANY.

1. **RIGHT OF WAY.—STATUTE CONSTRUED.**—The grant of the right of way to the plaintiff through the public lands of the United States, made by the second section of the Act of Congress of July 1, 1862, was a present grant, operating immediately upon the passage of the act, without reservation or exception, and was subject to no conditions except those which

were subsequent, or necessarily such as that the road should be constructed within the period specified, and be afterwards maintained and used for the purposes designated. All acquisitions of land over which this right of way was thus granted, made subsequent to the passage of the act, were subject to the exercise of this right. *C. P. R. Co. v. Dyer*, 642.

2. *IDEM.*—The reservations and exceptions found in the third section of the above act apply only to the grants of the land therein mentioned, and do not apply to the grant of the right of way made in the second section. *Id.*
3. *IDEM.*—The provision of the seventh section of the above act requiring the plaintiff, within two years, to designate the general route of the road as near as might be, and file a map of the same in the Department of the Interior, did not affect the grant of the right of way; it only furnished the means by which the Secretary could withdraw the lands within a specified distance of such designated route from præemption, private entry and sale. *Id.*

CHATTEL MORTGAGE.

See MORTGAGE.

COMMON CARRIER.

1. *CARRIER MAY SHOW THAT PACKAGE WAS SECRETLY DEFECTIVE.*—Although the bill of lading states that a package was received in good order, the carrier may, nevertheless, show that it was secretly defective or insufficient. *The Oriflamme*, 176.
2. *BURDEN OF PROOF.*—The burden of proof is upon the carrier to show that a package receipted for in good order, was in fact secretly defective or insufficient; and unless he does so he is liable for the contents in case of loss. *Id.*
3. *CARRIER NOT ENTITLED TO KNOW CONTENTS OF PACKAGES.*—A common carrier is not, under all circumstances, entitled to know the contents of packages tendered for carriage, and a mere failure to ascertain whether the package contains anything dangerous, there being no reasonable ground for suspicion, does not, of itself, constitute negligence. *Parrott v. Barney*, 423.
4. *PERFORMANCE OF LEGAL DUTY MAY BE ASSUMED.*—In the exercise of his lawful rights, every man has a right to act upon the hypothesis that every other person will perform his duty, and obey the law; and in the absence of any reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to a danger, which can only come to him from a violation of law on the part of some other person. *Id.*

COLLISION.

1. *COLLISION, APPORTIONMENT OF DAMAGES.*—Collision between a steamboat and vessel at anchor, in a fog. Damages apportioned, it appearing that the vessel had neither a bell nor a fog-horn, and that the steamer failed to moderate her speed. *Morrison v. Steamboat Petaluma*, 126.

2. **LIGHTS REQUIRED BY LAW MUST BE DISPLAYED.**—A claim for damages by collision rejected; it appearing that the injured vessel omitted to display the lights required by law. *Larco v. Scho. Martha and Elizabeth*, 129.

CONSOLIDATION OF ACTIONS.

See **JUDGMENT AND DECREE**, 13.

CONSTITUTIONAL LAW.

1. **CONSTRUCTION OF XVTH AMENDMENT.**—Under the XVth amendment to the Constitution and the act of May 31, 1870 (16 Stat. 140), to enforce it, all persons declared citizens of the United States by the XIVth amendment are entitled to vote in the States where they reside, at all elections by the people, without distinction of race, color or previous condition of servitude; but the several States, notwithstanding the amendment, have the power to deny the right of suffrage to any citizens of the United States on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civic duties, crime or other cause not specified in the amendment. *McKay v. Campbell*, 374.
2. **IDEM.**—The power of Congress over the subject of the right to vote in the several States is conferred by the XVth amendment and is confined to the enforcement of such amendment, by preventing the States from discriminating between citizens of the United States in the matter of the right to vote, on account of race, color or previous condition of servitude.
3. **CONSTITUTIONALITY OF LAW TO ARREST AND IMPRISON.**—The Legislature has power to authorize the arrest and imprisonment of such a debtor so as to enable his creditors to enforce the establishment and collection of their debts by legal proceedings in the tribunals of this State. *Norman v. Manciette*, 484.
4. **PRODUCTION OF BOOKS.**—**INTERNAL REVENUE ACT.**—Proceedings under the 14th section of the Revenue Act to compel the production of books, and giving of evidence before an Assessor, are civil, and not criminal. *In re Strouse*, 605.
5. **IDEM.**—**ACT CONSTITUTIONAL.**—The examination of the books of a person under that section, is not an infringement of Article 4 of amendments to the Constitution of the United States, protecting persons from unreasonable searches, etc. *Id.*

See **BANKRUPTCY**, 46.

CONSULAR COURTS.

1. **CONSULAR COURTS.**—**LIMITED JURISDICTION.**—**JURISDICTIONAL FACTS.**—The Consular Court is a Court of limited jurisdiction, and all the jurisdictional facts must be alleged in the libel or petition, otherwise it will be insufficient. *Steamer Spark v. Lee Choi Chum*, 713.
2. **ALLOWANCE OF APPEALS FROM CHINA AND JAPAN.**—In cases of appeal from the Consular and Ministerial Courts of China and Japan to the Circuit Court of the United States for the District of California, the record on appeal must show an allowance of the appeal. *Id.*
3. **APPEAL.**—**CITATION.**—A citation is necessary unless the appeal is allowed

in open Court. *Query*: whether a citation is not always necessary, if the Consular Court has once adjourned after rendering a decree, there being no terms of such Courts. *Id.*

CONTRACT AND CONSTRUCTION.

1. **FISHING VESSELS.—RIGHTS OF SEAMEN.**—Where by the articles the crew of a fishing vessel were bound to make the fish, and on the arrival of the vessel the owners declined to allow them to do so, and the men remained by the vessel for nearly two months, at all times ready and willing to make the fish, and then left her and sued for their shares of the catch: *Held*, that their readiness and willingness to make the fish were equivalent to an actual performance of their contract; and that they were entitled to be paid their shares. Various charges made by the owners disallowed. *Goodrich v. The Barque Domingo*, 182.
2. **BREACH OF ENTIRE CONTRACT.**—When a vendor of grain, bound by the contract to deliver from time to time upon requisitions made by the purchaser, refuses to deliver upon requisitions made in pursuance of the contract, and notifies the purchaser that he regards the contract as rescinded, and that he will deliver no more grain under it, the purchaser may treat the contract as wholly broken, and sue for, and recover, the damages upon the entire contract, without making further requisitions. *United States v. Robinson*, 19.
3. **CONSTRUCTION OF CONTRACT.**—In construing a contract, Courts will consider the condition of things existing at the time it was made, and with reference to which the contract was executed. *Lamb v. Davenport*, 609.
4. **JUDICIAL KNOWLEDGE.**—Courts will judicially take notice of matters of public history, such as the general condition of the country, and of the titles to lands in Oregon prior to the passage of the Act of Congress of September 27, 1850, called the "Donation Act." *Id.*
5. **POSSESSION.—PUBLIC LAND.**—As between individual citizens, rights to the possession of the public lands have been recognized and protected by the Courts of the Territories and New States, and of the United States, and acquiesced in by the Government. *Id.*
6. **CONTRACTS IN PARI MATERIA.**—Where several successive contracts are made between the same parties in respect to the same subject matter, and apparently in pursuance of the same general purpose, they are in *pari materia*, and may be read together, and considered in the light of the surrounding circumstances, for the purpose of ascertaining the intent designed to be expressed by the parties in some particular covenant in one of the contracts. *Id.*
7. **WHOLE INSTRUMENT CONSIDERED.**—Where the language of the covenants in a contract is more comprehensive than that of the recitals, the intent will be ascertained from a consideration of the entire instrument. *Id.*
8. **FACTS STATED.**—On March 10, 1852, Lownsdale, Coffin and Chapman were in the joint occupation of a land claim in Oregon, which had been laid out into town lots, and before that time had jointly and severally sold lots, or the possession of lots, throughout the claim to divers persons, and to one another, and thereupon, to enable themselves to notify upon and obtain patents for separate tracts of said claim under the

Donation Act of September 27, 1850; said L., C. and C. entered into an agreement to partition the land claimed between them, and also covenanted therein with one another, that when they should obtain patents to said separate tracts, each of them would make good and sufficient deeds for all lots sold as aforesaid in the part or tract so patented to him:
Held,

- 1st. COVENANT CONSTRUED.—That said covenant, as to lots before sold by said parties jointly, or by any of them separately, is a covenant for the benefit of the vendees of said lots, and those claiming under them, and not of the covenantors themselves. *Id.*
- 2d. TITLE VESTED IN TRUST.—That upon the acquisition of the title from the United States by said Lownsdale, in pursuance of said covenant and Act of Congress, the said covenant to acquire the title for the benefit of the said several vendees of the lots before sold became executed, and the title thereto vested in said Lownsdale, but in trust for the benefit of said prior vendees. *Id.*
- 3d. BENEFICIARIES MAY SUE.—That the said prior vendees, for whose benefit the said covenant was made and the title acquired to said lots sold, are entitled to maintain actions in a Court of Equity in their own names, to enforce the trust and compel a conveyance of the legal title. *Id.*
- 4th. CONTRACTS PRIOR TO DONATION ACT VALID.—That sundry agreements relating to the land entered into by Lownsdale, Coffin and Chapman, and each of them, prior to the passage of said Donation Act, are valid contracts. *Id.*
- 5th. SAID SUBSEQUENT AGREEMENT VALID.—That the said agreement containing said covenant to acquire the title to lots sold, for the benefit of the prior vendees of the parties to it, is not a "future contract for the sale of the land," within the meaning of the provisions of the fourth section of the Donation Act, and is not made void by the act; but the said agreement is valid. *Id.*
- 6th. DONATION ACT.—PRESENT GRANT.—That, as to existing settlements commenced before the passage of said Donation Act, the said act is a grant *in præsentia* to the party entitled under the act, and it vested the title in fee from the date of its passage, subject only to be defeated by a failure to perform the conditions subsequently prescribed in the act. *Id.*
- 7th. TRUST IMPOSED BY AGREEMENT.—That the agreement aforesaid being executed between L., C. & C., and they and each of them having an estate in the land at the date thereof, which was partitioned and perfected by means of said agreement and the action of said parties thereunder, a trust was imposed upon the land obtained by each of them in favor of the purchasers, or their assigns, as to all the lots before that time sold therein by either or all of them as aforesaid, which trust could be enforced in equity by said purchasers or their assigns, although they are mere volunteers from whom no consideration moved in the premises. *Id.*
- 7th. RIGHTS OF PURCHASER, DONATION ACT.—That the purchaser of a town lot from a land claimant or settler, under the Donation Act, did not contribute in any way to the acquisition of the title by such settler—the mere possession of such purchaser, whether actual or constructive, being derived from and subordinate to that of the settler, and being in itself not sufficient to enable such purchaser to acquire the title to said lot

from the United States under the Donation Act, as against such settler or otherwise. *Id.*

9th. AGREEMENT NOT A FUTURE CONTRACT.—That the agreement of March 10, 1852, aforesaid, is not a “future contract for the sale of the land” to which the parties thereto were entitled under the Donation Act, but rather an agreement concerning past sales and transactions, made for the purpose of securing conveyances to be made of lots therein, in pursuance of sales made prior thereto, and is therefore not within the prohibition against future contracts in section 4 of said Act. *Id.*

See INTERNAL REVENUE, 9.

CORPORATIONS.

1. WHEN STOCKHOLDER OR CREDITOR OF CORPORATION CAN MAINTAIN SUIT FOR INJURY TO CORPORATE RIGHTS.—A stockholder or creditor of a corporation cannot maintain a suit for an injury to the corporate rights, unless it appears from the bill that the corporation refused to take proper measures to protect or redress the same. *Newby v. Oregon Central R. R. Co.*, 64.
2. OWNER OF CORPORATION BONDS SAME RIGHT TO SUE AS STOCKHOLDER OF CORPORATION.—The owner of corporation bonds secured by a lien upon lands claimed by the corporation, has the same right as a stockholder of such corporation to maintain a suit to prevent another corporation from obtaining such lands by the wrongful use of the name of his corporation. *Id.*
3. CORPORATION NOT LIABLE TO ITS STOCKHOLDERS OR CREDITORS FOR ERROR OF JUDGMENT.—In choosing between remedies deemed equally effective, a corporation has a right to exercise its judgment, and for an error in this respect neither its stockholders nor creditors can call it to an account. *Id.*
4. JURISDICTION OF REGISTER.—Where a petition in bankruptcy is filed in the name and on behalf of a corporation without proper authority, the Register acquires no jurisdiction to adjudge the corporation a bankrupt. *In re Lady Bryan Co.*, 349.
5. AUTHORITY, WHAT.—Under the provisions of the thirty-seventh section of the Bankrupt Act, the filing of a petition on behalf of a corporation, can only be “duly authorized by a vote of the majority of the corporators at any legal meeting called for the purpose.” *Id.*
6. WHO ARE CORPORATORS—A “corporator,” within the meaning of the Act, is one of the constituents or stockholders of the corporation. *Id.*
7. TRUSTEES CANNOT AUTHORIZE.—Although the management of the affairs of a corporation is committed by the laws of the State to a Board of Trustees, such Board cannot authorize the filing of a petition in bankruptcy, under an act of Congress, devolving that authority upon a majority of the corporators to be exercised at a meeting called for the purpose. *Id.*
8. ORDER OF REGISTER VACATED.—Where the Register in bankruptcy adjudged a corporation to be a bankrupt upon a petition filed upon the authority of the Board of Trustees, the adjudication was set aside by the Dis-

strict Court on petition of an attaching creditor, and this action affirmed by the Circuit Court. *Id.*

9. **SUBSEQUENT RATIFICATION.**—A ratification of the action of the Trustees and the Register by the stockholders, after the adjudication in such case, does not cure the defect of want of jurisdiction of the Register at the commencement of proceedings, and at the time of the adjudication. *Id.*
10. **INCAPACITY OF CORPORATION NO DEFENSE TO TRESPASS.**—In an action by a corporation for injuries to property in its possession, the Court will not, at the instance of the wrong-doers, enter into any inquiry as to the legal capacity of such corporation to hold the property. *Cole Sil. M. Co. v. V. & G. H. W. Co.*, 470.

COVENANT.

1. **SALE AND COVENANT TO MAKE TITLE AN ESTOPPEL IN EQUITY.**—On February 26, 1860, Daniel H. Lownsdale, being the owner of an undivided interest in the west half of the Portland land claim, including Block 258, in said city, commonly called the Nancy Lownsdale tract, under the Donation Act of September 27, 1850 (9 Stat. 497), executed a bond in the penal sum of \$700 conditioned as follows: Whereas, I have this day sold, released and quitclaimed unto Robbins, his heirs and assigns, etc., all that piece or parcel of land, described by metes and bounds, the same being Block 258 aforesaid: and, whereas, said Robbins has made his promissory note to said Lownsdale, or order, for the balance of the purchase money, payable in twelve months from date; “Now, know ye also that if said note shall be truly paid, and I, the said bounden Lownsdale, shall give unto said Robbins a good and sufficient title to said land according to these presents, and such further confirmation as the title from the United States may vest in me, then this obligation to be null and void, otherwise,” etc.: *Held*, that such instrument was in effect a contract of sale of Lownsdale’s interest in the Block 258, and also a covenant to make a good title to the whole land contained therein, and that the heirs of said Lownsdale were thereby estopped in equity from asserting any interest in said block, as such heirs. *Lamb v. Carter*, 212.
2. **SAME.—ESTOPPEL.**—Under a decree partitioning that portion of the Portland land claim, called the Nancy Lownsdale tract, between her children and the heirs and vendees therein of Daniel H. Lownsdale—three fifths to the former and two fifths to the latter in gross—the heirs of said Daniel H. can only claim as heirs, and not as purchasers, and are therefore estopped to claim any interest thereby in any specific portion of said two fifths against the agreement or covenant of their ancestor, the same as he would be, if living. *Id.*
3. **COVENANT IN DEED AGAINST ACTS OF GRANTOR.**—A covenant in a deed, “against the claims of all persons claiming by, through or under the grantors,” only operates upon the estate in the granted premises which the covenantor then had. *Lamb v. Burbank*, 227.
4. **SAME.**—Such a covenant only refers to the existing title or interest granted, and does not bar the covenantor from claiming the same premises against his own covenantee or grantee by an after acquired title. *Id.*
5. **COVENANT FOR FURTHER ASSURANCE.**—A covenant in a deed, that if “the

- grantors obtain title from the United States, they will convey the same to the grantees by deed of general warranty, is a covenant for further assurance, and entitles such grantees, when the contingency happens, to such conveyance of the legal title. *Id.*
6. COVENANTS IN DEEDS.—No covenant is implied from the use of the words in a deed, “bargain, sell and quitclaim.” *Lamb v. Kamm*, 238.
 7. *IDEM.*—A bargain, sale and quitclaim of all a party’s “right, title or interest” in real property, “whether in possession or expectancy,” passes nothing but what is then vested in the bargainor. *Id.*
 8. ESTATE IN EXPECTANCY.—DEFINITION OF.—Does not include a mere hope or possibility, without present interest. *Id.*
 9. COVENANTS IN DEEDS.—A covenant, that the bargained premises are free from encumbrances caused by the grantor, is not prospective, and is limited to the acts of the grantor. *Id.*
 10. *IDEM.*—A covenant against the claim, right or title of any person claiming through the grantor, is equivalent to a special covenant of non-claim or warranty. *Id.*
 11. *IDEM.*—Such a covenant only operates upon the estate which the grantor then had in the premises, and does not prevent him or his heirs from asserting an after-acquired title to the same premises. *Id.*
 12. COVENANTS CANNOT ENLARGE THE PREMISES OF DEED.—Where such deed contained a covenant to warrant and defend said *lands* to the purchaser, it must be construed to mean only the right, title and interest in such lands, bargained and sold by said Daniel H.; the covenants cannot enlarge the premises of a deed. *Lamb v. Wakefield*, 251.
 13. *IDEM.*—A covenant to warrant and defend the bargained premises against all persons, except the United States government, or those deriving title therefrom, does not estop Daniel H. or his heirs from claiming title to an interest in the premises subsequently purchased from Isabella E. Potter, a donee of the United States. *Id.*

See LANDLORD AND TENANT, 1, 3; CONTRACT, 3, 6, 7, 8.

CRIMES AND CRIMINAL PROCEDURE.

1. MOTION TO QUASH INDICTMENT.—A motion to set aside or quash an indictment will not lie unless the objection appear upon the face of the indictment. *United States v. Brown*, 531.
2. *IDEM.*—An affidavit of a defendant that he believed the grand jury acted upon incompetent or insufficient evidence in finding an indictment against him, not allowed on a motion to squash. *Id.*
3. NO DEFENDANTS BEFORE INDICTMENT FOUND.—There are no defendants or co-defendants to an inquiry before the grand jury, until the indictment is found and filed in Court. *Id.*
4. WITNESS COMMITTING HIMSELF.—Under the Act of February 25, 1868 (15 Stat. 37), a person may be compelled in a judicial proceeding to testify to matters tending to criminate himself, but no use can be made of such testimony against the witness in a criminal proceeding. *Id.*
5. ACT JULY 6, 1862, CONSTRUCTION OF.—The Act of July 6, 1862 (12 Stat. 588), only extends the thirty-fourth section of the judiciary act to cases

in equity and admiralty, and does not include criminal actions or proceedings. *Id.*

6. INFORMATION.--Misdemeanors may be prosecuted in the national Courts by information. *United States v. Waller*, 701.

See INDICTMENT.

DAMAGES.

1. MEASURE OF DAMAGES.—The actual damages sustained, directly resulting from the infringement of a patent, is the amount to be recovered. *Carter v. Baker*, 512.
2. DAMAGES, HOW ASCERTAINED.—The damages must be found from the evidence; not from mere conjecture without regard to evidence. *Id.*
3. PROFITS.—The plaintiff is entitled to recover the profits realized by the wrong-doer from the infringement of a patent, as a part of the damages. *Id.*
4. CONFUSION OF RIGHTS.—BURDEN OF PROOF.—If the party infringing has improved the machine, and a part of the profits are due to his improvement, the portion of the profits due to such improvement do not belong to the owner of the prior patent; but the burden of proof rests on the infringer to show what portion of the profits are due to his improvement. *Id.*
5. OTHER DAMAGES.—The actual damages may be more than the actual profits realized by the infringer, as the infringer may have sold at a much lower price than the patentee would have been able, and entitled, to sell. If so, this circumstance should be considered, and the whole profits which the plaintiff would have realized, should be given. *Id.*
6. IDEM.—STOCK CARRIED OVER.—So, also, the patentee may have been unable to sell machines manufactured, in consequence of the sales of the infringing party, and have, consequently, been compelled to carry them over. If so, the interest on the capital invested in the machines so carried over, is a proper element of damages to be considered. *Id.*
7. TWO PATENTS.—DAMAGES APPORTIONED.—Where the plaintiff, who patents a machine, and afterwards an improvement on the same machine—his machine put upon the market embodying both inventions—sues for an infringement of the first patent only, he is not entitled to recover, as damages, that part of the enhanced price of the machine, which is due to his second patent; and the burden of proof rests upon him to show how much of the price, or profits, are due to the patent infringed. *Id.*
8. OTHER MACHINES AND PROFITS.—Plaintiff is not entitled to recover, as a part of his damages, any loss sustained in consequence of an infringement of his patent by reason of his inability to sell *other* machines, than those embodying the infringed patent. The profits recovered must be the direct and legitimate fruits of the patent infringed. *Id.*
9. PROFITS ON ENTIRE MACHINE RECOVERED.—The plaintiff selected certain elements and combined them into a plow which he patented. The plow could only be used as an entirety—as one machine. He had the exclusive right to make, use and vend the machine as a whole: *Held*, that he is entitled to recover of an infringer the profits on the whole machine. *Id.*

10. **MEASURE OF DAMAGES.**—Rules for assessment of damages in cases of beating and wounding a seaman. *Hanson v. Fowler*, 539.

See COLLISION, 1, 2.

DECREE.

1. **EFFECT OF DECREE OF AUGUST 12, 1865.**—The effect of the decree of August, 12, 1865, in the suit for partition of the Nancy Lownsdale tract, considered and declared, as between the heirs and vendees of Daniel H. in any particular tract allotted to them according to their respective interests. *Lamb v. Wakefield*, 251.
2. **ENTRY ON MINUTES.—FINAL DECREE.**—Where the minutes of the former United States District Court for the Southern District of California, showed that the Judge delivered an opinion overruling exceptions and confirming a survey of a Mexican grant, but no decree appeared to have been made or written opinion filed: *Held*, that no final decree had been made and that the cause was still pending. *U. S. v. Garcia*, 383.
3. **DUTY OF SUCCESSOR TO JUDGE.**—*Held*, further, that it was the duty of this Court, which had succeeded to the jurisdiction of the late Southern District Court, to enter a decree in the cause; but that on a showing, such as would justify an order for a new trial, or rehearing, or leave to file a bill of review, the cause might be re-examined. *Id.*

See JUDGMENT AND DECREE.

DEED.

1. **COVENANT IN DEED AGAINST ACTS OF GRANTOR.**—A covenant in a deed “against the claims of all persons claiming by, through or under the grantors,” only operates upon the estate in the granted premises which the covenantor then had. *Lamb v. Burbank*, 227.
2. **SAME.**—Such a covenant only refers to the existing title or interest granted, and does not bar the covenantor from claiming the same premises against his own covenantee or grantee by an after acquired title. *Id.*
3. **COVENANT FOR FURTHER ASSURANCE.**—A covenant in a deed, that if “the grantors obtain title from the United States, they will convey the same to the grantees by deed of general warranty, is a covenant for further assurance, and entitles such grantees, when the contingency happens, to such conveyance of the legal title. *Id.*
4. **COVENANTS IN DEEDS.**—No covenant is implied from the use of the words in a deed, “bargain, sell and quitclaim.” *Lamb v. Kamm*, 238.
5. **IDEM.**—A bargain, sale and quitclaim of all a party’s “right, title or interest” in real property, “whether in possession or expectancy,” passes nothing but what is then vested in the bargainer. *Id.*
6. **ESTATE IN EXPECTANCY.—DEFINITION OF.**—Does not include a mere hope or possibility, without interest. *Id.*
7. **COVENANTS IN DEEDS.**—A covenant, that the bargained premises are free from encumbrances caused by the grantor, is not prospective, and is limited to the acts of the grantor. *Id.*
8. **IDEM.**—A covenant against the claim, right or title of any person claiming

through the grantor, is equivalent to a special covenant of non-claim or warranty. *Id.*

9. **IDEM.**—Such a covenant only operates upon the estate which the grantor then had in the premises, and does not prevent him or his heirs from asserting an after-acquired title to the same premises. *Id.*
10. **DEED BY TENANT IN COMMON GOOD AGAINST HIMSELF.**—A deed by a tenant in common for his interest in a particular part of the land held in common, although void as against his co-tenants, is good against himself and those claiming under him. *Lamb v. Wakefield*, 251.
11. **IDEM.**—A deed by which Daniel H. bargained, sold, etc., all his right, title, interest, claim and demand to Block 252 in the city of Portland, only passed to the purchaser the one fifth interest in the premises which Daniel H. then had. *Id.*
12. **COVENANTS CANNOT ENLARGE THE PREMISES OF DEED.**—Where such deed contained a covenant to warrant and defend said *lands* to the purchaser, it must be construed to mean only the right, title and interest in such lands, bargained and sold by said Daniel H.; the covenants cannot enlarge the premises of a deed. *Id.*
13. **IDEM.**—A covenant to warrant and defend the bargained premises against all persons, except the United States government, or those deriving title therefrom, does not estop Daniel H. or his heirs from claiming title to an interest in the premises subsequently purchased from Isabella E. Potter, a donee of the United States. *Id.*

DISTILLERY AND DISTILLED SPIRITS.

1. **SEC. 44, ACT JULY 20, 1868, TO WHOM APPLICABLE.**—Section 44, of the Act of July 20, 1868 (15 Stat. 142), is applicable to any person who distills spirits (15 Stat. 150), without having paid the special tax therefor, or giving bond, as required by law, whether such person has registered his still or given notice of his intention to engage in the business or not. *United States v. Mathoit*, 142.
2. **PROOF OF VIOLATION OF SAID LAW.**—Where unstamped spirits are found in the premises of the defendant which contain the machinery and appliances for distilling spirits, this fact unexplained is sufficient to justify the jury in finding that such spirits were distilled on the premises, and since the last inspection of them by the gauger. *Id.*
3. **SAME.**—Jury instructed that the evidence would justify them in finding that certain premises and still continued to be the property of the defendant, as before then stated by him in his act of registry and notice of intention to distill, and therefore were employed in the illegal distillation in question, with his consent and for his benefit. *Id.*
4. **PRESUMPTION OF OWNERSHIP.**—When it is shown that certain property belongs to a particular person, the law presumes that the ownership remains unchanged, until the contrary appears. *Id.*
5. **ACT OF JULY 20, 1868, SECTIONS 25, 45 AND 96 CONSTRUED.**—1. The knowing and willful omission, neglect and refusal of the wholesale liquor dealer to cause packages of distilled spirits to be gauged, inspected and stamped, as required by section 25 of the Act of July 21, 1868, expose

the distilled spirits and liquors owned by the wholesale liquor dealer to the forfeiture denounced in the 96th section of the Act. *United States v. 133 Casks Distilled Spirits*, 188.

6. **THE LANGUAGE OF SECTION 96** of the Act of July 20, 1868, denouncing the forfeiture is not uncertain. "All distilled spirits or liquors owned by him shall be forfeited," is to be construed to mean all distilled spirits and liquors. It was not intended to discriminate between distilled spirits and liquors, and to create an alternative forfeiture of one exclusive of the other, but to include within the general term "liquors," whatever the more special term "distilled spirits" might not embrace. *Id.*
7. **THE PROVISIONS OF THE 69TH SECTION** of the Act of July 20, 1868, do not apply to infractions of the provisions of the 45th section. *Id.*

See INTERNAL REVENUE.

DIVORCE.

1. **DIVORCE, DISPOSITION OF PROPERTY OF THE PARTIES.**—The Oregon Act of January 17, 1854, relating to marriage and divorce, which gave the Court granting a divorce power to "make such a disposition of the property of the parties" as might appear "just and equitable" under the circumstances of the case, and to "make such disposition of and provision for the children as shall appear most expedient," did not authorize such Court to give the property of either parent to the children, except during their minority, and as a means of providing for their nurture and education during such minority. *Fitch v. Connell*, 156.

DONATION ACT, OREGON.

1. **CHILDREN OF SETTLERS UNDER DONATION ACT.**—Under section 4 of the Donation Act (9 Stat. 497), upon the death of the wife of the settler, after compliance with the law, and before patent issues, the share of the wife is granted by the Act to her husband and children, and they take as donees of the United States, and not as heirs of such wife. *Lamb v. Wakefield*, 251.

See CONTRACT, 4, 8.

EJECTMENT.

1. **EQUITABLE TITLE NO DEFENSE TO ACTION AT LAW.**—An equitable title is no defense to an action for possession by the holder of the legal title. *Stark v. Starr*, 15.
2. **TOWN SITE ACT NOT IN FORCE PRIOR TO JULY 17, 1854.**—The Act of May 23, 1844 (5 Stat. 657), commonly called the Town Site Act, was not in force in Oregon prior to July 17, 1854. *Id.*
3. **EJECTMENT, DEFENDANT MUST PLEAD HIS TITLE.**—The Oregon Code (226) does not allow a defendant in ejectment to defeat the plaintiff, by giving in evidence any estate in himself or another in the property in controversy, unless the same be pleaded in his answer. *Id.*
4. **COLOR OF TITLE.**—Color of title is only the appearance of title, and therefore it matters not whether the grantor in a deed had any title or not, if it appears from the face of such deed, when compared with the law regulating the subject, that he might have had title, his formal conveyance gives color of title to possession, taken or held under it. *Id.*

-
5. **POSSESSION PRESUMED TO BE RIGHTFUL.**—Possession is presumed to be rightful until the contrary appears, and therefore adverse to the title of any other claimant; and this rule extends to the case of a vendee as against his vendor after the performance of the conditions of purchase by the former. *Id.*
6. **WHEN VALUE OF IMPROVEMENTS MAY BE SET OFF AGAINST MESNE PROFITS.** A person in possession under color of title, who believes, and has good reason to believe that his title is good, is acting in good faith, so as to entitle him to set off the value of improvements made by him upon the property, against a claim for mesne profits. *Id.*
7. **POSSESSION PRESUMED TO BE IN GOOD FAITH.**—A person in possession under color of title, who makes permanent improvements upon the property, is presumed to be acting in good faith until the contrary appears. *Id.*
8. **WHAT IS A PERMANENT IMPROVEMENT.**—A permanent improvement is something done or put upon the land by the occupant which he cannot remove, either because it has become physically impossible to separate it from the land, or, in contemplation of law, it has been annexed to the soil and become a part of the freehold. *Id.*
9. **IDEM.—VALUE SET OFF.**—To entitle a defendant in an action for mesne profits to set off the value of improvements made upon the land against such profits, they must not only be permanent, but they must add to the future value of the property for the ordinary purposes for which it is or may be used. *Id.*
10. **STREET IMPROVEMENT NOT AN IMPROVEMENT ON THE PROPERTY.**—A street improvement is not an improvement made on the property, upon which the assessment was made for such improvement, and therefore the value of it cannot be set off by the occupant against a claim for mesne profits. *Id.*
11. **STREET ASSESSMENTS MAY BE SET OFF AGAINST MESNE PROFITS.**—It is the duty of a party in possession of property, claiming title or interest therein, to pay the taxes and charges imposed thereon, and therefore an assessment for street improvement paid by a defendant in an action for mesne profits, is a proper deduction from the gross value of the rents of the property, in estimating the actual damage which the plaintiff has sustained, by the defendants withholding the possession. *Id.*
12. **EJECTMENT.—WHEN LANDLORD MAY BE MADE DEFENDANT.**—A landlord has no right to apply to be made defendant in an action of ejectment in place of the tenant until the latter files his answer, stating “that he is in possession only as the tenant of another, naming him and his place of residence.” (Or. Code, 225.) *Fitch v. Connell*, 156.
13. **ANSWER SHOULD STATE FACTS, NOT EVIDENCE.**—A defendant in ejectment should state in his answer the nature and duration of the estate he claims in the premises, if any, but not the evidence of it. (Or. Code, 226–7.) *Id.*
14. **EXHIBIT NO PART OF A PLEADING.**—An exhibit is no part of a pleading in an action at law; a record or instrument should be stated in a pleading either according to its tenor or legal effect. *Id.*
15. **JUDGMENT IN EJECTMENT WHEN NO BAR TO ANOTHER ACTION.**—If a verdict

for the defendant in an action for ejectment only states that the defendant is entitled to the possession of the premises, a judgment therein is not necessarily a bar to another action between the same parties for the same property. (Or. Code, 227.) *Id.*

16. **MEANE PROFITS.—SET-OFF.**—A plea of set-off for permanent improvements made upon the premises in an action for meane profits, is not sufficient, unless it allege that such improvements were made by the defendant or those under whom he claims while holding under color of title, adversely to the claim of the plaintiff and in good faith. (Or. Code, 227.) *Id.*

See JUDGMENT AND DECREE, 8, 15.

EQUITY.

1. **IN EQUITY, NOTICE OF FILING PLEA OR DEMURRER MUST BE ENTERED IN ORDER BOOK.**—In equity a party does not take notice of the filing of a plea or demurrer, unless notice thereof be entered in the order book, as prescribed by Equity Rule 4. *Newby v. Oregon Central R. R. Co.*, 63.
2. **PLEAS IN EQUITY.—NATURE OF.**—Plea in equity, nature of, in bar and abatement, and where double allowed. *Id.*
3. **PATENT FOR MEXICAN GRANTS—PURCHASERS FROM PATENTEE.**—Where a bill in equity was filed by the alleged heirs of a deceased Mexican grantee of a rancho, and the defendants were purchasers for value and without notice from parties by whom the claim had been presented to the Board of Commissioners, who had obtained a confirmation, and to whom a patent had been issued; and it appeared that these parties derived title under a sale made by a Probate Court, which it was subsequently decided by the Supreme Court of this State had no jurisdiction: *Held*, that the defendants were not chargeable with constructive notice of the invalidity of the derivative title presented by the patentees to the Board, and that the legal title acquired by them under the patent, should be protected as against the equitable rights set up by the alleged heirs of the Mexican grantee. *Hordy v. Harbin*, 194.
4. **PARTITION OF REAL PROPERTY—SUIT IN EQUITY FOR.**—Where the legal title is not in dispute, a suit for partition of real property may be maintained in a Court of Equity, although the equitable title to the whole premises is claimed by certain of the defendants and disputed by the complainants. *Lamb v. Burbank*, 227.
5. **PARTIES TO BILL BEFORE SERVICE.**—A person residing out of the jurisdiction of the Court, though named as defendant in a bill, is, substantially, not a party to the action, till service of process or appearance. *Cole Sil. M. Co. v. Vir. & G. H. W. Co.*, 470.
6. **EFFECT OF OMISSION ON JURISDICTION.**—Whenever the making of a person a party to a bill would oust the jurisdiction of the Court, as to other parties, such person, if not an indispensable party, may be omitted, for the purpose of exercising jurisdiction, as to other parties, whose rights can be determined without his presence. *Id.*
7. **JOINT TRESPASSER OMITTED.**—In an action to restrain the diversion of water by tort-feasors, one of the tort-feasors, who resides out of the jurisdiction of the Court, may be omitted. *Id.*

-
8. **AMENDMENT.—INJUNCTION.**—The Court may permit an amendment to a bill, by omitting a non-resident, named thereon as defendant, but not served, without prejudice to a motion for injunction. *Id.*
9. **INCAPACITY OF CORPORATION NO DEFENSE TO TRESPASS.**—In an action by a corporation for injuries to property in its possession, the Court will not, at the instance of the wrong-doers, enter into any inquiry as to the legal capacity of such corporation to hold the property. *Id.*
10. **WRONGFUL DIVERSION OF WATER.**—Plaintiff, in excavating a tunnel in a mountain to its mining claim, on the public lands of the United States, struck a subterranean flow of water, which it appropriated and enjoyed for several years. Defendants ran a tunnel from a distant point into the mountain, to a point some thirty feet in altitude, directly below the point where the plaintiff obtained the said water; and, thereupon, the water, which before flowed through plaintiff's tunnel, was intercepted and discharged through defendants' tunnel, and by them appropriated to their own use: *Held*, that said diversion and appropriation of the water was wrongful, and that complainant was entitled to an injunction. *Id.*
11. **PRELIMINARY MANDATORY INJUNCTION.**—Where defendants, by means of a tunnel run into a mountain at a lower altitude than complainant's tunnel, wrongfully intercept water appropriated by complainant, flowing in its said tunnel, and divert it therefrom, a preliminary injunction will be granted, restraining the continuance of said diversion, even though an obedience to the injunction should render it necessary for defendants to build a bulkhead, or dam, across the tunnel. *Id.*
12. **INJUNCTION TO STAY JUDGMENT.—NOTICE OF APPLICATION FOR NO STAY.** Where a judgment is given in an action at law for the recovery of the possession of real property, and a bill in equity is filed by the defendant therein to stay proceedings, and notice given of an application for a provisional injunction to enjoin the enforcement of the judgment, the plaintiff in the judgment is in no way prohibited or restrained from enforcing the same, until an injunction is actually granted and served, or he has notice of the order allowing it. *Kamm v. Stark*, 547.
13. **INJUNCTION NOT GRANTED AFTER EXECUTION.**—A provisional injunction will not be granted to restrain the plaintiff in an action at law from enforcing a judgment, where it appears that between the filing of the bill and the time of the application for the injunction, the judgment had been enforced by execution. *Id.*
14. **INJUNCTION, WHEN NOT ALLOWED TILL AFTER FINAL HEARING.**—An injunction requiring a party to do a particular thing, as to surrender the possession of certain premises, is never allowed before final hearing. *Id.*
15. **SUBPOENA, SERVICE OF, UPON ATTORNEY.**—In case of a bill in equity to stay proceedings at law or a cross-bill, where the plaintiff in the action at law or original bill is beyond the jurisdiction of the Court, the Court will order the subpoena to be served upon the attorney of such absent plaintiff; but when the judgment in such action at law has been enforced, the authority of the attorney to represent the absent party is at an end, and such order will not be made. *Id.*
16. **BENEFICIARY OF TRUST.**—When he may sue in equity in his own name. *Lamb v. Davenport*, 609.

17. **MULTIFARIOUSNESS.**—The Central Pacific Railroad Company claiming a right of way, also, for depots, water tanks, etc., on the public lands under an Act of Congress, filed a bill in equity to quiet its title against a large number of defendants, each claiming adversely under the preemption laws of the United States, rights in separate and distinct tracts of land so occupied by the railroad company, the quantity claimed by such being unknown to the complainant: *Held*, that the title of the complainant being the same, and the question to be determined being common to all the defendants, the bill is not multifarious. *Cent. Pa. R. R. Co. v. Dyer*, 641.
18. **ACTION TO DETERMINE ADVERSE CLAIMS.**—The Statute of Nevada providing that an action may be brought by any person in possession of real property, against any person who claims an estate or interest therein adverse to him for the purpose of determining such adverse interest, enlarges the class of cases in which the jurisdiction of courts in equity, was formerly exercised in quieting the title and possession of real property. *Id.*
19. **INDISPENSABLE PARTIES.**—One whose rights will necessarily be affected by the operation of a decree in equity is an indispensable party to the action, and the Court will not proceed to a decree without his presence. *Cole S. M. Co. v. V. & G. H. W. Co.*, 685.
20. **PROPER PARTIES.**—Where a decree can be made settling the rights of the parties before the court, without affecting the rights of others absent, the Court may proceed to a decree, although those absent might be proper parties to the action. *Id.*
21. **JURISDICTION OUSTED.**—Where the bringing in of an absent party, whose presence might otherwise be deemed material, would oust the Court of jurisdiction; the Court will “strain hard” to grant relief as to the parties before it. *Id.*
22. **MANDATORY PRELIMINARY INJUNCTION.**—In a proper case, a Court of Equity will grant a preliminary injunction in a restrictive form, although an obedience to the injunction should require the performance of substantive acts on the part of the party enjoined. *Id.*
23. **DENIAL ON INFORMATION.**—The Court will not dissolve a preliminary injunction upon the denials of the equities of the bill made upon information and belief merely; nor upon affirmative allegations of new matter meeting the equities of the bill made only upon information and belief. *Id.*

ESTATE EXPECTANCY.

3. **ESTATE IN EXPECTANCY.**—**DEFINITION OF.**—Does not include a mere hope or possibility, without present interest. *Lamb v. Kamm*, 238.

ESTOPPEL.

1. **SALE AND COVENANT TO MAKE TITLE AN ESTOPPEL IN EQUITY.**—On February 26, 1860, Daniel H. Lownsdale, being the owner of an undivided interest in the west half of the Portland land claim, including Block 258, in said city, commonly called the Nancy Lownsdale tract, under the Donation Act of September 27, 1850 (9 Stat. 497), executed a bond in the penal sum of \$700 conditioned as follows: Whereas, I have

this day sold, released and quitclaimed unto Robbins, his heirs and assigns, etc., all that piece or parcel of land, described by metes and bounds, the same being Block 258 aforesaid; and, whereas, said Robbins has made his promissory note to said Lownsdale, or order for the balance of the purchase money, payable in twelve months from date; "Now, know ye also, that if said note shall be truly paid, and I, the said bounden Lownsdale, shall give unto said Robbins a good and sufficient title to said land according to these presents, and such further confirmation as the title from the United States may vest in me, then this obligation to be null and void; otherwise," etc.: *Held*, that such instrument was in effect a contract of sale of Lownsdale's interest in the Block 258, and also a covenant to make a good title to the whole land contained therein, and that the heirs of said Lownsdale were thereby estopped in equity from asserting any interest in said block, as such heirs. *Lamb v. Carter*, 212.

2. **SAME.—ESTOPPEL.**—Under a decree partitioning that portion of the Portland land claim, called the Nancy Lownsdale tract, between her children and the heirs and vendees therein of Daniel H. Lownsdale—three fifths to the former and two fifths to the latter in gross—the heirs of said Daniel H. can only claim as heirs, and not as purchasers, and are therefore estopped to claim any interest thereby in any specific portion of said two fifths against the agreement or covenant of their ancestor, the same as he would be, if living. *Id.*
3. **ESTOPPEL BY MATTER IN PARS.**—The Government having finally located the Boga grant, so as to include the lands in question, against the protest of the claimant, Larkin, the former selection by said Larkin of other lands, and disclaimer as to these, do not now estop him or those in privity with him, from setting up the title derived under their patent, as against the claimants under the subsequent grant to Fernandez, located on the same land after said selection and disclaimer, and before the final location of the Boga grant. *Bissell v. Henshaw*, 553.

EVIDENCE.

1. **CARRIER MAY SHOW THAT PACKAGE WAS SECRETLY DEFECTIVE.**—Although the bill of lading states that a package was received in good order, the carrier may, nevertheless, show that it was secretly defective or insufficient. *The Oriflamme*, 176.
2. **BURDEN OF PROOF.**—The burden of proof is upon the carrier to show that a package receipted for in good order, was in fact secretly defective or insufficient; and unless he does so he is liable for the contents in case of loss. *Id.*
3. **MODELS AND MACHINES** rightly understood furnish very persuasive evidence on questions of improvement and infringement of patent. *Carter v. Baker*, 512.
4. **GREATER USEFULNESS, EVIDENCE.**—Greater usefulness is a circumstance to be considered by the jury on questions of infringement, but it is not conclusive. The point must be determined upon the whole evidence. *Id.*

5. **ABSENCE.—PRESUMPTION OF DEATH.**—When a party has been absent seven years without being heard of, the presumption of law then arises that he is dead. But when a party is once shown to be alive, the presumption of law is that he continues alive until his death is proved, or the rule of law applies by which such death is presumed to have occurred, that is, at the end of seven years. This presumption of life is received in the absence of any countervailing testimony, as conclusive of the fact establishing it for the purpose of determining the rights of parties as fully as the most positive proof. The only exception to the operation of this presumption is when it conflicts with the presumption of innocence, in which case the latter prevails. *Montgomery v. Bevans*, 653.
6. **LIFE PRESUMPTIONS.**—The presumption of the continuance of life rebutted in this case by evidence tending to show that the absent party met his death soon after his disappearance. *Id.*

See EXPERTS.

EXECUTION AND EXECUTION SALES.

1. **JUDGMENT SALE VALID, THOUGH JUDGMENT REVERSED.**—A sale of lands regularly made under a judgment of a Court of record, valid upon its face, is valid; and a subsequent reversal of the judgment, on appeal, will not defeat the title acquired by a stranger through such sale. *Galpin v. Page*, 309.
2. **EXECUTION BEFORE JUDGMENT ROLL MADE UP.**—Under the Practice Act of the State of California, an execution may be issued and executed as soon as the judgment is entered, and before the judgment roll is actually made up. *Id.*

EXPERTS.

1. **EXPERTS.**—The testimony of experts is to be considered like any other testimony; is to be tried by the same tests, and receive just so much weight and credit as the jury may deem it entitled to, when viewed in connection with all the circumstances. *Carter v. Baker*, 512.

FALSE IMPRISONMENT.

1. **ACTION FOR FALSE IMPRISONMENT.**—There can be no recovery in an action for false imprisonment when it appears that the affidavit on which the defendant procured the arrest of the plaintiff is sufficient on its face, because then there is no trespass; and if the affidavit be false, the action must be for malicious prosecution, in which both malice and want of probable cause must be alleged and proved. *Norman v. Mancietle*, 484.
2. **PROBABLE CAUSE.—DAMAGES.**—In an action for false imprisonment, the question of probable cause is only material in mitigation of damages. *Id.*

FEEES.

1. **OFFICER'S FEES.**—An officer must look to the party, or his attorney, who employed him for his fees; he has no claim upon the adverse party. *Zeiber v. Hill*, 268.

See ATTACHMENTS, 2.

FISHING CONTRACTS.

See **CONTRACT**, 1.

FORFEITURE.

See **INTERNAL REVENUE**, 1, 6, 7.

FRAUDULENT CONVEYANCE.

1. **BANKRUPT.—FRAUDULENT CONVEYANCE BY.**—Judgment in favor of the assignee for the value of property conveyed to an alleged creditor of the bankrupt, notwithstanding that the conveyance was made more than six months before the commencement of the proceedings in bankruptcy, it appearing that the conveyance was fraudulent and intended to cheat and hinder creditors. *Hyde v. Sontag*, 249.

GRANTS OF LAND BY STATUTE.

See **CENTRAL PACIFIC RAILROAD**.

GUARDIANS.

1. **MINOR DEFENDANTS, HOW JURISDICTION ACQUIRED OF.**—A general guardian cannot voluntarily appear for minor defendants, but they must be served with process, and a guardian *ad litem* appointed for them, when brought into Court. *Fitch v. Connell*, 157.

HOME PORT.

See **VESSEL AND MARITIME LIENS**.

IMPRISONMENT FOR DEBT.

1. **IMPRISONMENT FOR DEBT IN ADMIRALTY SUITS.**—The Act of March 2, 1867 (14 Stat. 543), adopting the State law concerning "modifications, conditions and restrictions upon imprisonment for debt" does not apply to process in Admiralty suits. *Hanson v. Fowle*, 497.
2. **CLAIM FOR DAMAGES FOR INJURY TO PERSON NOT A CLAIM FOR A DEBT.**—An action to recover damages for an injury to the person with force is not an action to recover a debt, and the claim for such damages is not a claim for a debt, within the meaning of that term as used in the act of 1867 (Ad. Rule 48, or Sub. 19 of Art. 1 of the State Constitution)—at least until it is changed or merged in a judgment for a sum certain. *Id.*
3. **AT COMMON LAW.**—At common law, a *capias* lay, both before and after judgment in actions for injuries committed with force, but not otherwise, until the statute of Marlbridge (52 Hen. III, C. 23, and Westminster 2, 13 Edw. I, C. 11, etc). *Id.*

IMPROVEMENTS, VALUE, ETC.

1. **MESNE PROFITS.—SET-OFF.**—A plea of set-off for permanent improvements made upon the premises in an action for mesne profits, is not sufficient, unless it allege that such improvements were made by the defendant, or those under whom he claims while holding under color of title, ad-

versely to the claim of the plaintiff and in good faith. (Or. Code, 227.)
Filch v. Connell, 156.

See EJECTMENT, 6, 7, 8, 9, 10, 11.

INDICTMENT.

1. **INDICTMENT FOR VIOLATION OF INTERNAL REVENUE LAWS.**—An indictment which charges a defendant with carrying on the business of a retail liquor dealer without payment of a special tax at a certain place, continuously between certain dates, is sufficient without stating the means or circumstances by which he became such retail dealer. *U. S. v. Howard*, 507.
2. **IDEM.**—All persons who deal in tobacco are not liable to pay a special tax, and therefore an indictment which charges that a person was a dealer in tobacco without paying the special tax, is not sufficient, but the indictment should also show that he was such a dealer as is required to pay such tax. *Id.*
3. **IDEM.**—A person for the time being in the possession and control of a billiard table, in a place or building open to the public, is *prima facie* the proprietor of a billiard room, and liable to pay the special tax therefor, even if the general property and ultimate control of the table or place, or either of them, be in some one else. *Id.*
4. **IDEM.**—An allegation, that a party carried on the business of keeping a billiard table in a particular building, although unskillful pleading, is equivalent to an allegation that he kept a billiard room and was the proprietor thereof. *Id.*
5. **MOTION TO QUASH INDICTMENT.**—A motion to set aside or quash an indictment will not lie unless the objection appear upon the face of the indictment. *United States v. Brown*, 531.
6. **IDEM.**—An affidavit of a defendant that he believed the grand jury acted upon incompetent or insufficient evidence in finding an indictment against him, not allowed on a motion to quash.
7. **NO DEFENDANTS BEFORE INDICTMENT FOUND.**—There are no defendants or co-defendants to an inquiry before the grand jury, until the indictment is found and filed in Court.

INJUNCTION.

1. **CREDITORS OF BANKRUPT WHEN NOT ENJOINED.**—The District Court has jurisdiction to ascertain and liquidate all liens upon the bankrupt's property, and in the exercise of this jurisdiction may enjoin a creditor from enforcing a judgment in a State Court against the property of the bankrupt, but after the process of the State Court has been executed by a sale of property, the District Court will not interfere. *In re Fuller*, 243.
2. **DISTRICT COURT IN BANKRUPT PROCEEDINGS MAY RESTRAIN EXECUTION OF PROCESS OF STATE COURT.**—The District Courts of the United States, sitting in bankruptcy, have power to restrain, by injunction, the Sheriff of a State Court from proceeding to sell the property of a voluntary bankrupt, under an execution issued out of a State Court upon a judgment obtained before the commencement of proceedings in bankruptcy. *In re Mallory*, 88.

3. **AMENDMENT.—INJUNCTION.**—The Court may permit an amendment to a bill, by omitting a non-resident, named thereon as defendant, but not served, without prejudice to a motion for injunction. *Cole S. M. Co. v. V. & G. H. W. Co.*, 470.
4. **PRELIMINARY MANDATORY INJUNCTION.**—Where defendant, by means of a tunnel run into a mountain at a lower altitude than complainant's tunnel, wrongfully intercepts water appropriated by complainant, flowing in its said tunnel, and divert it therefrom, a preliminary injunction will be granted, restraining the continuance of said diversion, even though an obedience to the injunction should render it necessary for defendants to build a bulkhead, or dam, across the tunnel. *Id.*
5. **JOINT TRESPASSER OMITTED.**—In an action to restrain the diversion of water by tort-feasors, one of the tort-feasors, who resides out of the jurisdiction of the Court, may be omitted. *Id.*
6. **INJUNCTION TO STAY JUDGMENT.—NOTICE OF APPLICATION FOR NO STAY.** Where a judgment is given in an action at law for the recovery of the possession of real property, and a bill in equity is filed by the defendant therein to stay proceedings, and notice given of an application for a provisional injunction to enjoin the enforcement of the judgment, the plaintiff in the judgment is in no way prohibited or restrained from enforcing the same, until an injunction is actually granted and served, or he has notice of the order allowing it. *Kamm v. Stark*, 547.
7. **INJUNCTION NOT GRANTED AFTER EXECUTION.**—A provisional injunction will not be granted to restrain the plaintiff in an action at law from enforcing a judgment, where it appears that between the filing of the bill and the time of the application for the injunction, the judgment had been enforced by execution. *Id.*
8. **INJUNCTION, WHEN NOT ALLOWED TILL AFTER FINAL HEARING.**—An injunction requiring a party to do a particular thing, as to surrender the possession of certain premises, is never allowed before final hearing. *Id.*
9. **SUBPOENA, SERVICE OF UPON ATTORNEY.**—In case of a bill in equity to stay proceedings at law or a cross-bill, where the plaintiff in the action at law or original bill is beyond the jurisdiction of the Court, the Court will order the subpoena to appear to be served upon the attorney of such absent plaintiff; but when the judgment in such action at law has been enforced, the authority of the attorney to represent the absent party is at an end, and such order will not be made. *Id.*
10. **MANDATORY PRELIMINARY INJUNCTION.**—In a proper case, a Court of Equity will grant a preliminary injunction in a restrictive form, although an obedience to the injunction should require the performance of substantive acts on the part of the party enjoined. *C. S. M. Co. v. V. & G. H. W. Co.*, 686.
11. **DENIAL ON INFORMATION.**—The Court will not dissolve a preliminary injunction upon the denials of the equities of the bill made upon information and belief merely; nor upon affirmative allegations of new matter meeting the equities of the bill made only upon information and belief.

See BANKRUPTCY, 21.

IN PARI MATERIA.

See CONTRACT AND CONSTRUCTION, 6.

INSURRECTION.

1. **LIMITATION DURING TIME OF INSURRECTION.**—From and after the Act of July 13, 1861 (12 Stat. 257), and the proclamation of August 16, 1861 (Id. 1262), pursuant thereto, declaring the inhabitants of Arkansas to be in a state of insurrection against the United States, and until the termination of such insurrection, an inhabitant of Arkansas could not maintain an action in the Courts within the State of Oregon against an inhabitant of the latter State, and therefore the period during which such insurrection existed is not to be counted as a part of the time limited for the commencement of such an action. *Chappelle v. Olney*, 401.
2. **AUTHORITY OF PRESIDENT TO DECLARE THAT INSURRECTION HAD CEASED.**
The Act of July 13, 1861, impliedly authorized the President, so long as Congress did not otherwise provide, to declare by proclamation that the insurrection before declared to exist by him, had ceased, as to the inhabitants of any State or section thereof. *Id.*
3. **EXCEPTIONS TO STATE OF INSURRECTION IN ARKANSAS.**—The President having declared the inhabitants of Arkansas in a state of insurrection, the Court does not judicially know that any portion of them, then or afterwards, were within the exceptions in the proclamation because they in fact maintained a loyal adhesion to the Union, or inhabited a portion of the State occupied and controlled by the forces of the United States. *Id.*
4. **RIGHT OF ACTION NOT TO SURVIVE TO WIFE.**—A chose in action accruing to a woman during coverture survives to her, unless the husband reduce it to his exclusive possession during his lifetime; therefore, when a legacy was given to the wife, and she and her husband joined in a power of attorney authorizing O. to collect and receive the same for her use and benefit, the receipt of the money by O. during the life of the husband was not the possession of the latter, except for use of the wife, and the right to recover the same from O. survived to her. *Id.*
5. **INTEREST DURING STATE OF INSURRECTION.**—Interest is not recoverable upon a debt owing by an inhabitant of Oregon to an inhabitant of Arkansas during the period the inhabitants of the latter State were in a state of insurrection against the United States. *Id.*

INTEREST.

1. **STIPULATION IN JUDGMENT AS TO INTEREST.**—A stipulation in a judgment that the interest on it shall bear interest if not paid annually, is void and does not make such judgment usurious. *In re Fuller*, 243.
2. **INTEREST DURING STATE OF INSURRECTION.**—Interest is not recoverable upon a debt owing by an inhabitant of Oregon to an inhabitant of Arkansas during the period the inhabitants of the latter State were in a state of insurrection against the United States. *Chappelle v. Olney*, 401.

INTERNAL REVENUE.

1. **ACT OF JULY TWENTIETH, 1868, SECTIONS 6, 7, 8 AND 44, CONSTRUED.**—The lot or tract of land (as intended in sections 6, 7, 8 and 44 of the Act of 1868), of which a description is to be given, or which is required to be

unencumbered, or for the value of which a bond is to be given, and which it is forbidden to encumber, and which under section 44 may be forfeited, is, as declared in section 7, the real estate and premises connected with the distillery, that is used in connection therewith to facilitate the carrying on of the business and conducive to that end, and does not include such pastures, orchards and vineyards as are in no other way connected with such distillery than that they are contiguous and under the same ownership. *United States v. Spreckens*, 85.

2. SEC. 44, ACT JULY 20, 1868, TO WHOM APPLICABLE.—Section 44, of the Act of July 20, 1868 (15 Stat. 142), is applicable to any person who distils spirits (15 Stat. 150,) without having paid the special tax therefor, or giving bond, as required by law, whether such person has registered his still or given notice of his intention to engage in the business or not. *United States v. Mathoit*, 142.

3. PROOF OF VIOLATION OF SAID LAW.—Where unstamped spirits are found in the premises of the defendant which contain the machinery and appliances for distilling spirits, this fact unexplained is sufficient to justify the jury in finding that such spirits were distilled on the premises, and since the last inspection of them by the gauger. *Id.*

4. SAME.—Jury instructed that the evidence would justify them in finding that certain premises and still continued to be the property of the defendant, as before then stated by him in his act of registry and notice of intention to distill, and therefore were employed in the illegal distillation in question, with his consent and for his benefit. *Id.*

5. PRESUMPTION OF OWNERSHIP.—When it is shown that certain property belongs to a particular person, the law presumes that the ownership remains unchanged, until the contrary appears. *Id.*

6. ACT OF JULY 20, 1868, SECTIONS 25, 45 AND 96 CONSTRUED.—1. The knowing and willful omission, neglect and refusal of the wholesale liquor dealer to cause packages of distilled spirits to be gauged, inspected and stamped, as required by section 25 of the Act of July 20, 1868, expose the distilled spirits and liquors owned by the wholesale liquor dealer to the forfeiture denounced in the 96th section of the Act. *U. S. v. 133 Casks Dist. Spirits*, 188.

7. THE LANGUAGE OF SECTION 96 of the Act of July 20, 1868, denouncing the forfeiture is not uncertain. "All distilled spirits or liquors owned by him shall be forfeited," is to be construed to mean all distilled spirits and liquors. It was not intended to discriminate between distilled spirits and liquors, and to create an alternative forfeiture of one exclusive of the other, but to include within the general term "liquors," whatever the more special term "distilled spirits" might not embrace. *Id.*

8. THE PROVISIONS OF THE 69TH SECTION of the Act of July 20, 1868, do not apply to infractions of the provisions of the 45th section. *Id.*

9. PAWNBROKERS' TICKETS.—The ticket given by a pawnbroker under the Statute of California is "an agreement or contract" within the meaning of section 170 of the Internal Revenue Act of 1864. *United States v. Smith*, 192.

10. PROFITS ON STOCKS.—TAXABLE INCOME.—The successive Acts of Congress, from that of August 5, 1861 (12 Stat. 309), to that of March 2, 1857 (14

Stat. 479), upon the subject of taxing incomes, construed as being *in pari materia*, and requiring a return for taxation as income of all gains derived from the sale of corporation stocks in 1868, if purchased at any time after August 5, 1861. *United States v. Smith*, 277.

11. EXCHANGE NOT A SALE.—PROFITS ON NOT TAXABLE.—A *bona fide* exchange of stocks for other property, however much to the apparent advantage of the owner of the stocks, is not a sale thereof, from which profits are derived liable to taxation as income. *Id.*
12. TRANSFER OF STOCKS.—WHEN A SALE.—A transfer of stocks for a promissory note, which is collectable, or an exchange thereof for land, followed by a sale of such land within the year, for collectable promissory notes, is to be considered a sale of such stock for so much cash. *Id.*
13. CORRUPT INTENT.—PERJURY.—Although the affidavit of a party to his income return be false, he cannot be convicted of perjury thereon, unless it was made with a corrupt intention, and therefore, if such party, as a matter of law or fact, honestly believed that he was not bound to return any profits from the sale of stocks, for taxation, then, although he was mistaken and his affidavit in this respect false, he cannot be convicted of perjury. *Id.*
14. INCOME TAX JUST AND EXPEDIENT.—The tax upon incomes is both just and expedient, and the objection that it is inquisitorial applies with equal force to the State law which provides for imposing a direct tax upon all the articles of property of which a person is possessed. *Id.*
15. CORRUPT INTENT, QUESTION FOR JURY.—Upon an indictment for perjury, whether the oath was knowingly and corruptly false, is a question for the jury, and the Court will not set aside their verdict thereon, unless it is clearly against the weight of evidence. *Id.*
16. PERJURY IN SWEARING TO INCOME RETURN.—Although the Act imposing a tax upon incomes (14 Stat. 479) makes no provision for *compelling* a person to make oath to his return of income, yet it *permits* him to do so, and if he avails himself of the privilege, and intentionally swears falsely, he is guilty of perjury. (13 Stat. 239.) *Id.*
17. PROFITS ON STOCKS TAXABLE FOR WHAT YEAR.—The profits made upon a sale of stocks in 1868 were taxable as income for that year, without reference to the year in which the increase in the value of the stocks occurred, so that it was subsequent to the Act of August 5, 1861 (12 Stat. 309), imposing a tax on incomes. *Id.*
18. WHO LIABLE AS ASSAYER.—A mining company not assaying for others, but assaying its own ores, on its own account only, and not assaying any bullion or amalgam, is required to pay a special tax as assayer, under subdivision forty-eight of section seventy-nine of the Internal Revenue Act of June 30, 1864, as amended in 1866. *Y. J. S. M. Co. v. Gage*, 494.
19. INDICTMENT FOR VIOLATION OF INTERNAL REVENUE LAWS.—An indictment which charges a defendant with carrying on the business of a retail liquor dealer without payment of a special tax at a certain place, continuously between certain dates, is sufficient without stating the means or circumstances by which he became such retail dealer. *U. S. v. Howard*, 507.

-
20. **IDEM.**—All persons who deal in tobacco are not liable to pay a special tax, and therefore an indictment which charges that a person was a dealer in tobacco without paying the special tax, is not sufficient, but the indictment should also show that he was such a dealer as is required to pay such tax. *Id.*
21. **BILLIARD TABLE.—PROPRIETOR, WHO.**—A person for the time being in the possession and control of a billiard table, in a place or building open to the public, is *prima facie* the proprietor of a billiard room, and liable to pay the special tax therefor, even if the general property and ultimate control of the table or place, or either of them, be in some one else. *Id.*
22. **IDEM.**—An allegation, that a party carried on the business of keeping a billiard table in a particular building, although unskillful pleading, is equivalent to an allegation that he kept a billiard room and was the proprietor thereof. *Id.*
23. **PRODUCTION OF BOOKS.—INTERNAL REVENUE ACT.**—Proceedings under the 14th section of the Revenue Act to compel the production of books, and giving of evidence before an Assessor, are civil, and not criminal. *In re Strouse*, 605.
24. **IDEM.—ACT CONSTITUTIONAL.**—The examination of the books of a person under that section, is not an infringement of Article 4 of Amendments to the Constitution of the United States, protecting persons from unreasonable searches, etc. *Id.*
25. **DISCLOSURES PROTECTED.**—Disclosures so made, are protected by the Act of February 25, 1868, and cannot be used against the person making them before any Court or officer of the United States. *Id.*
26. **MUST PRODUCE BOOKS AND TESTIFY.**—The person summoned before the Assessor, must not only produce his books, but must submit them to examination, and testify concerning entries therein. *Id.*
27. **AMENDMENT.**—Section 14 of the Act of June 30, 1864, as amended by section 9 of the Act of July 13, 1866 (14 St. at Large, p. 101), construed. *Id.*
28. **SECTION 110, INTERNAL REVENUE ACT CONSTRUED.**—The one hundred and tenth section of the Revenue Act of the United States, as amended on the thirteenth of July, 1866, enacts that “there shall be levied, collected and paid a tax of one twenty-fourth of one per centum each month upon the average amount of the deposits of money, subject to payment by check or draft, or represented by certificates of deposits or otherwise, whether payable on demand or at some future day, with any person, bank, association, company or corporation engaged in the business of banking,” with a proviso that “deposits in associations or companies known as provident institutions, savings banks, savings funds or savings institutions, having no capital stock and doing no other business than receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits, without profit or compensation to the association or company, shall be exempt from tax on so much of their deposits as they have invested in securities of the United States, and on all deposits less than five hundred dollars made in the name of any one person:” *Held*, that where in an action to recover back moneys, paid under protest for taxes, the plaintiff in his complaint negatives the ex-

istence of the conditions required in the general clause of this section, it is unnecessary for it also to bring itself by its allegations within the terms of the proviso. *Ger. Sav. L. So. v. Oulton*, 695.

29. **CLASS OF DEPOSITS TAXABLE.**—The deposits which are liable to taxation under the above section, are those which are in all cases subject to payments by check or draft, or otherwise; that is, the liability of payment to the depositor, on the part of the bank or banker, must be absolute and not contingent. The payment must be made under all circumstances, either on demand or at some definite period, and not be dependent upon the occurrence of losses, or the acquisition of profits, or any other event. *Id.*
30. **CASE DISTINGUISHED.**—This case distinguished from the case of *The Bank of Savings v. The Collector* (3 Wall. 475). *Id.*

JUDGMENT AND DECREE.

1. **JUDGMENT IN EJECTMENT WHEN NO BAR TO ANOTHER ACTION.**—If a verdict for the defendant in an action for ejectment only states that the defendant is entitled to the possession of the premises, a judgment therein is not necessarily a bar to another action between the same parties for the same property. (Or. Code, 227.) *Fitch v. Connell*, 156.
2. **BANKRUPTCY, WHEN JUDGMENT VOID.**—A judgment taken contrary to the bankrupt act is not void unless a petition in bankruptcy is filed by or against the debtor within six months from the entry of the judgment. *In re Fuller*, 243.
3. **IDEM.**—A judgment by confession is not void under the code for want of a sufficient statement of the facts out of which the indebtedness arose, except as to creditors who have acquired a lien upon the debtor's property before a sale upon the confessed judgment. *Query*, whether such judgment is even then void if it can be shown by evidence *aliunde*, that the judgment was in fact given in good faith and for an actual debt. *Id.*
4. **STIPULATION IN JUDGMENT AS TO INTEREST.**—A stipulation in a judgment that the interest on it shall bear interest if not paid annually, is void and does not make such judgment usurious. *Id.*
5. **JUDGMENT LIEN, WHEN DECLARED VOID.**—The Bankruptcy Court has power to declare the lien of a judgment of a State Court void, as against the general creditors, if such lien is an unlawful preference under the Bankrupt Act. *In re Mallory*, 88.
6. **JUDGMENT LIEN LIQUIDATED IN BANKRUPTCY.**—The lien of a judgment, like other liens, is to be ascertained and liquidated in the Bankruptcy Court.
7. **EFFECT OF DECREE OF AUGUST 12, 1865.**—The effect of the decree of August 12, 1865, in the suit for partition of the Nancy Lownsdale tract, considered and declared, as between the heirs and vendees of Daniel H. in any particular tract allotted to them according to their respective interests. *Lamb v. Wakefield*, 251.
8. **JUDGMENT SALE VALID, THOUGH JUDGMENT REVERSED.**—A sale of lands regularly made under a judgment of a Court of record, valid upon its face, is valid; and a subsequent reversal of the judgment, on appeal, will not defeat the title acquired by a stranger through such sale. *Galpin v. Page*, 309.

9. **JURISDICTION SUPERIOR COURTS PRESUMED.**—On a collateral attack upon a judgment of a Superior Court, the Court will be conclusively presumed to have acquired jurisdiction, unless the record, on its face, affirmatively shows a want of jurisdiction. *Id.*
10. **RECORD SILENT; JURISDICTION PRESUMED.**—If the record of a Superior Court is silent as to the proof of a jurisdictional fact, on a collateral attack, due proof of the fact will be presumed in support of the judgment. *Id.*
11. **RECITAL CONCLUSIVE.**—The recital of a jurisdictional fact, there being nothing to the contrary in the record, is conclusive evidence, in a collateral proceeding, of the determination of the fact upon sufficient evidence, although the evidence does not appear in the record. *Id.*
12. **SERVICE BY PUBLICATION.**—Where the statute authorizes service of a summons issued by a Court of record, to be made with respect to a specific subject matter, by publication, the Court issuing the summons has jurisdiction to determine the fact, whether the service has been properly made; and the determination is conclusive, when collaterally brought into question. *Id.*
13. **CONSOLIDATED ACTIONS; JURISDICTION.**—Where two actions are consolidated, in one of which the Court has jurisdiction of all the parties, and the action in which the Court has acquired jurisdiction, requires precisely the same decree and sale as is entered in the consolidated action; the decree and sale thereunder will be valid, as a decree and sale in the action in which the Court has acquired jurisdiction, although the Court failed to acquire jurisdiction in the other action. *Id.*
14. **EXECUTION BEFORE JUDGMENT ROLL MADE UP.**—Under the Practice Act of the State of California, an execution may be issued and executed as soon as the judgment is entered in the judgment book, and before the judgment roll is actually made up. *Id.*
15. **DECREE IN ABSENCE OF INDISPENSABLE PARTIES.**—When a Court proceeds to a decree, in the absence of an indispensable party, without objection from any source, and the decree is not reversed or set aside, and a sale of real estate is had under the decree, whether said decree and sale is valid as to the parties before the Court, discussed, but not decided. *Id.*

JUDGMENT ROLL.

See JUDGMENT, 14.

JUDICIAL KNOWLEDGE.

1. **JUDICIAL KNOWLEDGE.**—Courts will judicially take notice of matters of public history, such as the general condition of the country, and of the titles to lands in Oregon prior to the passage of the Act of Congress of September 27, 1850, called the "Donation Act." *Lamb v. Davenport*. 609.

JURISDICTION.

1. **NATIONAL COURTS DO NOT DISCOURAGE SUITORS FROM SEEKING REDRESS IN THEIR TRIBUNALS.**—There is no rule of law or public policy which requires the National Courts to discourage suitors from seeking redress in

those tribunals, and parties have a clear right to become the owners of property for the express purpose of maintaining a suit in such courts concerning the same. *Newby v. Oregon Central R. R. Co.*, 64.

2. **INABILITY TO SUE NO TEST OF LIABILITY TO BE SUED IN NATIONAL COURTS.**—The inability of a party to *sue* in the National Courts, in a particular case, is no test of his liability *to be sued* in them under other circumstances. *Id.*
3. **SEIZURE NECESSARY.**—There must be an actual seizure before any judicial proceedings are instituted, to condemn a vessel for violation of the navigation laws of the United States. *United States v. The Fideliter*, 153.
4. **SEIZURE MUST BE ALLEGED.**—A seizure is a jurisdictional fact, and must be alleged in a libel to condemn a vessel for violation of the navigation laws of the United States. *Id.*
5. **OBJECTION FOR WANT OF SEIZURE, WHEN TAKEN.**—If a seizure is not alleged in the libel, the objection may be taken for the first time in the appellate Court. *Id.*
6. **RESIDENCE OR PLACE OF BUSINESS MUST BE WITHIN DISTRICT TO GIVE COURT JURISDICTION.**—Where a petition had been filed against certain parties praying that they be adjudged bankrupts, and on the return day they appeared and with their own consent were so adjudged; and subsequently another creditor moved the Court to dismiss the proceeding on the ground that the bankrupts had never resided or carried on business in this State: *Held*, that the Court was without jurisdiction and that the proceedings should be vacated and set aside. *Fogarty v. Gerrity*, 233.
7. **CREDITORS OF BANKRUPT WHEN NOT ENJOINED.**—The District Court has jurisdiction to ascertain and liquidate all liens upon the bankrupt's property, and in the exercise of this jurisdiction may enjoin a creditor from enforcing a judgment in a State Court against the property of the bankrupt, but after the process of the State Court has been executed by a sale of property, the District Court will not interfere. *In re Fuller*, 243.
8. **BANKRUPTCY.—JURISDICTION OF ORDINARY TRIBUNALS.**—The ordinary tribunals are not deprived, by mere force of an adjudication in bankruptcy, of jurisdiction over suits against the bankrupt. The proceedings in such suits may be arrested or controlled by the Bankruptcy Court, when necessary for the purposes of justice; but in the absence of such interference, the jurisdiction of the ordinary tribunals remains unimpaired and their judgments are valid. *In re Davis*, 260.
9. **JURISDICTION OF SUPERIOR COURTS PRESUMED.**—On a collateral attack upon a judgment of a Superior Court, the Court will be conclusively presumed to have acquired jurisdiction, unless the record, on its face, affirmatively shows a want of jurisdiction. *Galpin v. Page*, 309.
10. **RECORD SILENT; JURISDICTION PRESUMED.**—If the record of a Superior Court is silent as to the proof of a jurisdictional fact, on a collateral attack, due proof of the fact will be presumed in support of the judgment. *Id.*
11. **RECITAL CONCLUSIVE.**—The recital of a jurisdictional fact, there being nothing to the contrary in the record, is conclusive evidence, in a collateral proceeding, of the determination of the fact upon sufficient evidence although the evidence does not appear in the record. *Id.*

-
12. **SERVICE BY PUBLICATION.**—Where the statute authorizes service of a summons issued by a Court of record, to be made with respect to a specific subject matter, by publication, the Court issuing the summons has jurisdiction to determine the fact, whether the service has been properly made; and the determination is conclusive, when collaterally brought into question. *Id.*
13. **CONSOLIDATED ACTIONS; JURISDICTION.**—Where two actions are consolidated, in one of which the Court has jurisdiction of all the parties, and the action in which the Court has acquired jurisdiction, requires precisely the same decree and sale as is entered in the consolidated action; and decree and sale thereunder will be valid, as a decree and sale in the action in which the Court has acquired jurisdiction although the Court failed to acquire jurisdiction in the other action. *Id.*
14. **JURISDICTION OF REGISTER.**—Where a petition in bankruptcy is filed in the name and on behalf of a corporation without proper authority, the Register acquires no jurisdiction to adjudge the corporation a bankrupt. *In re Lady Bryan Co.*, 349.
15. **AUTHORITY, WHAT.**—Under the provisions of the thirty-seventh section of the Bankrupt Act, the filing of a petition on behalf of a corporation, can only be “duly authorized by a vote of the majority of the corporators at any legal meeting called for the purpose.” *Id.*
16. **SUBSEQUENT RATIFICATION.**—A ratification of the action of the Trustees and the Register by the stockholders, after the adjudication in such case, does not cure the defect of want of jurisdiction of the Register at the commencement of proceedings, and at the time of the adjudication. *Id.*
17. **PARTIES TO BILL BEFORE SERVICE.**—A person residing out of the jurisdiction of the Court, through named as defendant in a bill, is, substantially, not a party to the action, till service of process or appearance. *C. S. M. Co. v. V. & G. H. W. Co.*, 470.
18. **EFFECT OF OMISSION ON JURISDICTION.**—Whenever the making of a person a party to a bill would oust the jurisdiction of the Court, as to other parties, such person, if not an indispensable party, may be omitted, for the purpose of exercising jurisdiction, as to other parties, whose rights can be determined without his presence. *Id.*
19. **JURISDICTION, GENERAL LAND OFFICE.**—The Commissioner of the General Land Office has jurisdiction to revise or set aside a survey of a Mexican grant, made by the United States Surveyor-General for the State of California, under the Act of Congress of March 3, 1851. *Bissell v. Henshaw*, 553.
20. **JURISDICTION, FINAL LOCATION.**—But, conceding that the District Court had not jurisdiction, then the issuing of the patent is the final location, and the Statute of Limitations did not begin to run till the date of the patent, October 5, 1865. In either case the action was commenced in time. *Id.*
21. **CONSULAR COURTS.—LIMITED JURISDICTION.—JURISDICTIONAL FACTS.**—The Consular Court is a Court of limited jurisdiction, and all the jurisdictional facts must be alleged in the libel or petition, otherwise it will be insufficient. *Steamer Spark v. Lee Choi Chum*, 713.

LANDLORD AND TENANT.

1. **TENANTS' LIABILITY FOR WASTE.**—In the absence of some agreement to the contrary, the tenant is responsible for all waste, however, or by whomsoever committed, except it be occasioned by act of God, the public enemy, or the act of the reversioner himself. *Parrott v. Barney*, 423.
2. **LIABILITY, PUBLIC POLICY.**—The liability of tenants for waste does not depend on negligence, but is imposed on grounds of public policy. *Id.*
3. **COVENANT, WAIVER, ETC.**—A covenant in a lease to surrender the premises at the expiration of the term in as good condition as the reasonable wear thereof will permit, damages by the elements excepted, does not protect the tenant from liability for waste, resulting from accidents occurring without his fault. *Id.*
4. **IDEM.**—A covenant in a lease requiring the tenant to occupy the premises for a specific purpose, as an express office, does not impose on the landlord, and exempt the tenant from, all the risks incident to such business, not resulting from the wrongful acts or negligence of the tenant. *Id.*
5. **WASTE IN APARTMENTS.**—Waste may be committed by a tenant of a portion of a building. *Id.*
6. **ACCIDENTS.—LIABILITY FOR DAMAGES TO ADJOINING PREMISES.**—Defendants are expressmen carrying packages between New York and California. A wooden case containing nitro-glycerine was delivered to defendants at New York, to be carried to Los Angeles, California, in the ordinary mode, and in the ordinary course of business. No questions were asked, and no information given, as to its contents. On arriving at San Francisco, a liquid resembling oil appeared to be leaking from the case, and it was taken to the office of defendants, the premises leased from plaintiff, for examination. While under examination it exploded, injuring the premises occupied by defendants, and other premises of the plaintiff leased to, and occupied by, other parties. Defendants had no knowledge of, and no reason to suspect, the dangerous character of the contents, and there was, under the circumstances, no negligence on their part. *Held*, that defendants are not liable for the damage resulting from the accident to plaintiff's premises, occupied by other parties adjoining the premises held and occupied by defendants, but are liable for waste resulting to the premises occupied by themselves. *Id.*
7. **CARRIER NOT ENTITLED TO KNOW CONTENTS OF PACKAGES.**—A common carrier is not, under all circumstances, entitled to know the contents of packages tendered for carriage, and a mere failure to ascertain whether the package contains anything dangerous, there being no reasonable ground for suspicion, does not, of itself, constitute negligence. *Id.*
8. **PERFORMANCE OF LEGAL DUTY MAY BE ASSUMED.**—In the exercise of his lawful rights, every man has a right to act upon the hypothesis that every other person will perform his duty, and obey the law; and in the absence of any reasonable ground to think otherwise, it is not negligence, to assume that he is not exposed to a danger, which can only come to him from a violation of law on the part of some other person. *Id.*

LIEN.

See BANKRUPTCY, 22, 23; MARITIME LIEN; MECHANICS' LIEN.

LIGHTS.

See COLLISION, 2,

LIMITATION, STATUTE OF.

1. **LIMITATION DURING TIME OF INSURRECTION.**—From and after the act of July 13, 1861 (12 Stat. 257), and the proclamation of August 16, 1861 (Id. 1262), pursuant thereto, declaring the inhabitants of Arkansas to be in a state of insurrection against the United States, and until the termination of such insurrection, an inhabitant of Arkansas could not maintain an action in the Courts within the State of Oregon against an inhabitant of the latter State, and therefore the period during which such insurrection existed is not to be counted as a part of the time limited for the commencement of such an action. *Chappelle v. Olney*, 401.
2. **STATUTE LIMITATION.**—Section 7, of the Statute of Limitations of California, as amended in 1855, has no application to actions for the recovery of land. Section 6 is the only one applicable to such actions. *Bissell v. Henshaw*, 553.
3. **LIMITATION, MEXICAN GRANTS.**—Under the proviso to section 6, a party claiming title under a Mexican grant, can commence his action to recover the land at any time within five years after the final confirmation of the grant. *Id.*
4. **IDEM.**—The said proviso to section 6, refers to plaintiff's, not the defendant's title. *Id.*
5. **LIMITATION ACT OF 1863.**—The provisions of section 6, of the Statute of Limitations of 1863, are, substantially, the same on this point as section 6 of the Act of 1855. *Id.*
6. **WHAT FINAL CONFIRMATION.**—The issuing of the patent is the final confirmation within the meaning of the Statute of 1855, in all cases where the survey is not confirmed by the District Court, in pursuance of the Act of Congress of June 14, 1860; but, in those cases wherein the survey is confirmed under the provisions of said Act of Congress, the date of final confirmation is the date when the decree of the Court approving the location becomes final. *Id.*
7. **IDEM.**—These definitions of final confirmation were adopted in express terms in section 7 of the Statute of Limitations of 1863. *Id.*
8. **IDEM.—STATUTE OF LIMITATIONS OF 1863.**—The sixth section of the State Statute of Limitations of 1863, providing in substance that parties claiming real property under title derived from the Spanish or Mexican Governments, or the authorities thereof, which had not been finally confirmed by the United States, or its legally constituted authorities, shall be limited to five years after its passage, within which to bring an action for the recovery of the property or its possession, but if the title had been thus finally confirmed, the parties shall be subject to the same limitations as though they derived their title from any other source, that is, shall have five years from such final confirmation, is invalid so far as it applies to actions for the recovery of real property founded upon titles derived from Mexican or Spanish authorities, perfected after its passage, either by Act of Congress or by judicial decree, survey and patent, and

that, as to titles thus perfected, the ordinary period of limitation must be allowed from the date of their consummation, which exists with reference to actions on complete titles from other sources. *Montgomery v. Berans*, 654.

9. **MEXICAN GRANTS, LEGISLATION AFFECTING.**—The Act of Congress of March 3, 1851, passed in execution of the obligation of the United States, under the stipulations of the treaty by which California was ceded, to protect the holders of titles derived from Mexican or Spanish authorities, is not subject to any constitutional objection, so far as it applies to titles of an imperfect character; that is, to titles which require further action of the political department of the Government to render them perfect; and the action of the Government under this Act, and the rights of possession and enjoyment which the title perfected thereby gives, cannot be defeated or impaired by any State legislation.

See **MEXICAN GRANTS**, 13.

MARRIAGE.

1. **MARRIAGE AT COMMON LAW.**—*Seem*, that at common law, or in the absence of any statute prescribing the mode of contracting marriage, a contract to marry *per verba de futuro cum copula*, does not amount to a marriage in fact. *Holmes v. Holmes*, 99.
2. **MARRIAGE; WHAT CONSTITUTES IT ACCORDING TO LAWS OF OREGON AND CALIFORNIA.**—The laws of California (Hit. Dig. 4, 466) and of Oregon (Or. Code, 783, 785), require that the consent of the parties to become husband and wife, must be declared in the presence of a person authorized by such laws to solemnize marriage, and two witnesses, and without the observance of these formalities the marriage relation cannot be created or entered into, in either of such States. *Id.*
3. **MARRIAGES, WHEN VOID.**—Where citizens of a State purposely go beyond its jurisdiction and not within the jurisdiction of another State—as at sea—and there contract marriage otherwise than in accordance with the laws of such State, the transaction is a fraudulent evasion of the laws to which the parties owe obedience, and, therefore, void. *Id.*
4. **COHABITATION NOT MARRIAGE.—EVIDENCE OF PREVIOUS MARRIAGE.**—Living together as man and wife, although evidence of a previous marriage cannot make parties man and wife, nor can any length of cohabitation, however exclusive, ever constitute the relation of marriage. *Id.*
5. **MARRIAGE, CONSENT NECESSARY TO.**—Marriage, although arising out of contract or the consent of the parties, is a relation, as much so as that of parent and child, and such consent must be mutual and absolute *per verba de præsente*, not merely to live together exclusively, but to become joined to one another in the estate of matrimony. *Id.*
6. **COHABITATION NOT SUFFICIENT EVIDENCE OF MARRIAGE TO FOUND CLAIM FOR DOWER THEREON.**—On a bill to enforce a claim to dower, cohabitation of complainant and deceased and other circumstances, examined and held not sufficient evidence of a previous marriage between them. *Id.*
7. **MARRIAGE WITH THE CIRCUMSTANCES SHOULD BE ALLEGED IN PLEADINGS.**—Where a woman claims to have been the wife of another, it is an insu-

perable objection to such claim, that the pleadings do not contain an allegation of a marriage to such other, with the circumstances of time and place, and that she withholds her testimony as a witness upon the same point. *Id.*

8. **DIVORCE, DISPOSITION OF PROPERTY OF THE PARTIES.**—The Oregon Act of January 17, 1854, relating to marriage and divorce, which gave the Court granting a divorce power to “make such a disposition of the property of the parties” as might appear “just and equitable” under the circumstances of the case, and to “make such disposition of and provision for the children as shall appear most expedient,” did not authorize such Court to give the property of either parent to the children, except during their minority, and as a means of providing for their nurture and education during such minority. *Fitch v. Connell*, 156.

MARITIME LIEN.

1. **LIEN ON VESSEL FOR SUPPLIES.**—The maritime law does not give a lien upon a vessel for supplies furnished at the home port. *The Mary Bell*, 135.
2. **HOME PORT OF VESSEL.**—The residence of the owner is the home port of a vessel, although she may be enrolled elsewhere; the enrollment is only *prima facie* proof of the owner's residence, and therefore of the home port. *Id.*
3. **SUPPLIES FURNISHED VESSELS IN FOREIGN PORT.**—To whom or what credit presumed to be given. *Id.*
4. **SAME WHEN BILL MADE OUT AGAINST VESSEL AND OWNERS.**—When a bill for supplies is made out against the vessel by name and the owners, it is evidence that credit was given to the vessel, and that the personal responsibility of the owners was not exclusively relied upon. *Id.*
5. **ADMIRALTY.—DOMESTIC MATERIAL MEN.—MORTGAGEE.**—The lien of domestic material men will be enforced against proceeds in the registry in preference to the demand of a subsequent mortgagee of the vessel, notwithstanding that since the repeal of the 12th rule in Admiralty, such liens cannot be enforced in this Court by a proceeding *in rem*, nor in the State Courts by any proceeding which involves the exercise of admiralty jurisdiction. *Francis v. Barque Harrison*, 353.
6. **HALF PILOTAGE LIEN ON VESSEL MAY BE ENFORCED IN ADMIRALTY.**—The State statute gives a pilot half pilotage as a compensation for tendering his services to pilot a ship out over the Columbia river bar, in case the same are refused: *Held*, that such a claim is a claim for pilotage, which, by the general maritime law, is a lien upon the vessel, and the same may be enforced by a suit in admiralty. *In re The California*, 463.

MASTER OF VESSEL.

1. **SALVAGE CONTRACT BY MASTER SUSTAINED.**—A contract made by the master with salvors, for the recovery of the cargo of a sunken vessel, sustained. *Harley v. 467 Bars R. R. Iron*, 1.
2. **MASTER.—ERROR IN JUDGMENT OF.**—An error in judgment on the part of a master not shown to be incompetent in respect to the navigation of the vessel, will not render the owners liable for its consequences. *Haggett v. Bowman*, 4.

3. **DISSOLUTION OF CONTRACT WITH SEAMEN.—MASTERS' OBLIGATIONS.**—Where a seaman fails by his own fault to rejoin the ship at an intermediate port, at which she has touched in the course of the voyage, and she sails away without him, the master is not bound to reinstate him upon the return of the vessel to the same port in the course of her voyage. *Scully v. Great Republic*, 31.
4. **SUNDAY.—DUTY OF SEAMAN.—RIGHTS OF MASTER.**—A seaman has no right to refuse duty required of him on a Sunday, by our calendar, it appearing that at the port of Onnalaska, the day owing to a difference in the calendar, was not observed as a holiday; but the master had no right to expel him from the ship for such refusal. *Johnson v. The Barque Cyane*, 150.
5. **ASSAULT AND BATTERY OF OFFICER, WHEN MASTER LIABLE FOR.**—A master of a vessel is liable for an unjustifiable assault and battery by one of his officers upon one of the crew, when the same is done by his connivance, consent or authority. *Hanson v. Fowle*, 539.
6. **IDEM.**—The consent and authority of the master will be presumed when it appears that he knew of the trespass or had reason to know it, and did not interfere to prevent it. *Id.*
7. **IDEM.—SATISFACTION, PROOF OF.**—A receipt given by a seaman upon the payment of his wages, which contains a clause acknowledging satisfaction of all claims for assault and battery, is not binding unless shown to have been the result of a fair and free compromise or settlement for some substantial compensation or benefit to the seaman besides the payment of his wages. *Id.*
8. **IDEM.**—A receipt for all "demands and dues" against a vessel, her master and officers is not upon its face a receipt for assault and battery. *Id.*
9. **RECEIPT FOR CLAIMS EX CONTRACTU, AND CLAIMS EX DELICTO.**—The word "demand" on a receipt ordinarily relates only to claims arising *ex contractu*, and not to those arising *ex delicto*. *Id.*
10. **MEASURE OF DAMAGES.**—Rules for assessment of damages in cases of beating and wounding a seaman. *Id.*

MECHANICS' LIEN.

1. **CONSTRUCTION OF LIEN LAW OF NEVADA.**—Hauling quartz to a quartz mill is "performing labor for carrying on the mill." The lien is acquired by the performance of the work, and not by filing the notice, etc. *In re Hope Mining Co.*, 710.
2. **EFFECT OF REPEAL AFTER LABOR DONE.**—The repeal of the law after the lien has attached, by performance of work, does not defeat the lien.

MESNE PROFITS.

See EJECTMENT.

MEXICAN GRANT.

1. **PATENT FOR MEXICAN GRANTS—PURCHASERS FROM PATENTER.**—Where a bill in equity was filed by the alleged heirs of a deceased Mexican grantee of a rancho, and the defendants were purchasers for value and without

- notice from parties by whom the claim had been presented to the Board of Commissioners, who had obtained a confirmation, and to whom a patent had been issued; and it appeared that these parties derived title under a sale made by a Probate Court, which it was subsequently decided by the Supreme Court of this State had no jurisdiction: *Held*, that the defendants were not chargeable with constructive notice of the invalidity of the derivative title presented by the patentees to the Board, and that the legal title acquired by them under the patent, should be protected as against the equitable rights set up by the alleged heirs of the Mexican grantee. *Hardy v. Harbin*, 194.
2. **MEXICAN GRANT.**—Claimants' title confirmed on the equity of a permission to occupy provisionally, and on ancient possession. *United States v. Pico*, 347.
 3. **ENTRY ON MINUTES.—FINAL DECREE.**—Where the minutes of the former United States District Court for the Southern District of California, showed that the Judge delivered an opinion overruling exceptions and confirming a survey of a Mexican grant, but no decree appeared to have been made or written opinion filed: *Held*, that no final decree had been made and that the cause was still pending. *United States v. Garcia*, 383.
 4. **DUTY OF SUCCESSOR TO JUDGE.**—*Held*, further, that it was the duty of this court, which had succeeded to the jurisdiction of the late Southern District Court, to enter a decree in the cause; but that on a showing, such as would justify an order for a new trial, or rehearing, or leave to file a bill of review, the cause might be re-examined.
 5. **STATUTE LIMITATION.**—Section 7, of the Statute of Limitations of California, as amended in 1855, has no application to actions for the recovery of land. Section 6 is the only one applicable to such actions. *Bissell v. Henshaw*, 553.
 6. **LIMITATION, MEXICAN GRANTS.**—Under the proviso to section 6, a party claiming title under a Mexican grant, can commence his action to recover the land at any time within five years after the final confirmation of the grant. *Id.*
 7. **IDEM.**—The said proviso to section 6, refers to plaintiff's, not the defendant's, title. *Id.*
 8. **LIMITATION ACT OF 1863.**—The provisions of section 6, of the Statute of Limitations of 1863, are, substantially, the same on this point as section 6 of the Act of 1855. *Id.*
 9. **WHAT FINAL CONFIRMATION.**—The issuing of the patent is the final confirmation within the meaning of the Statute of 1855, in all cases where the survey is not confirmed by the District Court, in pursuance of the Act of Congress, of June 14, 1860; but, in those cases wherein the survey is confirmed under the provisions of said Act of Congress, the date of final confirmation is the date when the decree of the Court approving the location becomes final. *Id.*
 10. **IDEM.**—These definitions of final confirmation were adopted in express terms in section 7 of the Statute of Limitations of 1863. *Id.*
 11. **JURISDICTION, GENERAL LAND OFFICE.**—The Commissioner of the General Land Office has jurisdiction to revise or set aside a survey of a Mex-

- ican grant, made by the United States Surveyor-General for the State of California, under the Act of Congress of March 3, 1851. *Id.*
12. **SURVEY BOGA GRANT, JURISDICTION DISTRICT COURT.**—The survey of the Boga grant having been made and approved by the United States Surveyor-General for California, and returned into the District Court prior to June 14, 1860, and the said survey being on that day pending in said Court, for the purpose of contesting or reforming the same, it is one of the cases made subject to the provisions of the Act of Congress of June 14, 1860, relating to the subject, and the District Court had jurisdiction to revise said location. *Id.*
13. **JURISDICTION, FINAL LOCATION.**—But, conceding that the District Court had not jurisdiction, then the issuing of the patent is the final location, and the Statute of Limitations did not begin to run till the date of the patent, October 5, 1865. In either case the action was commenced in time. *Id.*
14. **ESTOPPEL BY MATTER IN PARS.**—The Government having finally located the Boga grant, so as to include the lands in question, against the protest of the claimant, Larkin, the former selection by said Larkin of other lands, and disclaimer as to these, do not estop him or those in privity with him, from setting up the title derived under their patent, as against the claimants under the subsequent grant to Fernandez, located on the same land after said selection and disclaimer, and before the final location of the Boga grant. *Id.*
15. **PROCEEDINGS UNDER ACT 1860, JUDICIAL.**—Proceedings to confirm surveys of Mexican grants by the United States District Court under the Act of Congress of June 14, 1860, are judicial in their nature; and the judgments therein are conclusive upon all parties thereto, and those who are required to make themselves parties. *Id.*
16. **IDEM.—IN REM, WHO MUST COME IN.**—The proceedings under said Act of June 14, 1860, are in the nature of proceedings *in rem*, and all parties claiming any interest must intervene for the protection of such interest, or be concluded. *Id.*
17. **TWO GRANTS LOCATED ON SAME LAND.**—There were two Mexican grants of land within the same exterior boundaries, one for five cagues, made February 21, 1844, and the other for four leagues, made June 12, 1846. The former was presented to the Board of Land Commissioners for confirmation March 24, and the latter, March 19, 1852. The decree of confirmation became final in the former, February 9, and in the latter March 2, 1857. The location of the junior grant was made by the Surveyor-General, and approved by the Commissioner of the General Land Office, and became final by the issuing of the patent, October 14, 1857. The elder grant was located by the District Court under the provisions of the Act of Congress of June 14, 1860, and became final June 26, 1865, and the patent issued October 6, 1865. The two patents overlapped to the extent of one square league: *Held*, that the patentees under the elder grant, though it was the last finally located and patented, have the better title.

See ALCALDE GRANTS.

MINORS.

5. **MINOR DEFENDANTS, HOW JURISDICTION ACQUIRED OF.**—A general guardian cannot voluntarily appear for minor defendants, but they must be served with process, and a guardian *ad litem* appointed for them, when brought into Court. *Fitch v. Connell*, 157.

MIXTURE OF GOODS.

See **BANKRUPTCY**, 55, 56.

MORTGAGE.

1. **CHATTEL MORTGAGE.—WHEN VOID.**—A mortgage of personal property, accompanied by an oral agreement or understanding between the parties thereto, that the property should remain in the possession of the mortgagor, and be disposed of by him in the course of his business, and the proceeds thereof applied to his own use, is a conveyance or assignment of such property in trust for the person making the same, and, therefore, void as against the creditors existing or subsequent of such mortgagor. (Or. Code, 655.) *Catlin v. Currier*, 7.
2. **FORECLOSURE.—RIGHTS OF THIRD PERSONS.**—A decree foreclosing a chattel mortgage does not affect the rights of third persons in the goods mentioned therein. *Id.*
- See **MARITIME LIENS**, 5.

MULTIFARIOUSNESS.

1. **MULTIFARIOUSNESS.**—Where a party in possession of land, files a bill against a large number of defendants, severally claiming an interest in separate parcels of said lands, the extent of the claim of each being unknown to complainant, the question to be determined being common to all, and the title of the complainant to the whole being the same, the bill is not multifarious.

NEW TRIAL.

1. **RIGHTS TO CHALLENGE A JUROR; WAIVES.**—Where a defendant is informed by the examination of a juror that he has had a conversation with a third person about the case, and makes no challenge on that ground, but accepts the juror, he cannot afterwards object to the verdict on that account. *United States v. Smith*, 277.
2. **NEW TRIAL.—NEWLY-DISCOVERED EVIDENCE.**—Applications for new trials on the ground of newly-discovered evidence, are liable to great abuse, and are therefore regarded with jealousy and construed with great strictness. *Id.*
3. **IDEM.—WHEN IT WILL BE GRANTED.**—To entitle a defendant to a new trial on the ground of newly-discovered evidence, it must appear, (1) that the *party* has discovered the evidence, or that it has come to his knowledge since the last trial, and (2) that it is so material that it would probably produce a different verdict if the new trial were granted. *Id.*
4. **NEW TRIAL.—SURPRISE.**—A new trial will not be granted upon the ground that the evidence of a witness took the party by surprise, unless it appears that such surprise is in no degree attributable to the negligence of such party. *Id.*

ONUS PROBANDI.

See COMMON CARRIER, 2.

PARTIES.

1. **EJECTMENT. — WHEN LANDLORD MAY BE MADE DEFENDANT.**—A landlord has no right to apply to be made defendant in an action of ejectment in place of the tenant until the latter files his answer, stating “that he is in possession only as the tenant of another, naming him and his place of residence.” (Or. Code, 226.) *Fitch v. Connell*, 156.
2. **DECREE IN ABSENCE OF INDISPENSABLE PARTIES.**—When a Court proceeds to a decree, in the absence of an indispensable party, without objection from any source, and the decree is not reversed or set aside; and a sale of real estate is had under the decree, whether said decree and sale is valid as to the parties before the Court, discussed, but not decided *Galpin v. Page*, 309.
3. **PARTIES TO BILL BEFORE SERVICE.**—A person residing out of the jurisdiction of the Court, though named as defendant in a bill, is, substantially, not a party to the action, till service of process or appearance. *Cole S. M. Co. v. V. & G. H. W. Co.*, 470.
4. **EFFECT OF OMISSION ON JURISDICTION.**—Whenever the making of a person a party to a bill would oust the jurisdiction of the Court, as to other parties, such person, if not an indispensable party, may be omitted, for the purpose of exercising jurisdiction, as to other parties, whose rights can be determined without his presence. *Id.*
5. **JOINT TRESPASSER OMITTED.**—In an action to restrain the diversion of water by tort-feasors, one of the tort-feasors, who resides out of the jurisdiction of the Court, may be omitted. *Id.*
6. **AMENDMENT.—INJUNCTION.**—The Court may permit an amendment to a bill, by omitting a non-resident, named thereon as defendant, but not served, without prejudice to a motion for injunction. *Id.*
7. **INDISPENSABLE PARTIES.**—One whose rights will necessarily be affected by the operation of a decree in equity is an indispensable party to the action, and the Court will not proceed to a decree without his presence. *C. S. M. Co. v. V. & G. H. W. Co.*, 685.
8. **PROPER PARTIES.**—Where a decree can be made setting the rights of the parties before the Court, without affecting the rights of others absent, the Court may proceed to a decree, although those absent might be proper parties to the action. *Id.*
9. **JURISDICTION OUSTED.**—Where the bringing in of an absent party, whose presence might otherwise be deemed material, would oust the Court of jurisdiction; the Court will “strain hard” to grant relief as to the parties before it. *Id.*
10. **APPEAL IN NAME OF STEAMER VOID.**—An appeal, or writ of error, in the name of a steamboat, or any other than that of a human being, or some corporate or associated aggregation of persons, cannot be sustained. *Steamer Spark v. Lee Choi Chum*, 713.
11. **APPEALS IN FIRM NAME, INADMISSIBLE.**—So, also, appeals in the name of a firm without stating the names of the individuals composing the firm, are nugatory. *Id.*

12. WHO MAY APPEAL.—No one but a party, in some form, to the action can appeal, or can be heard in any stage of the proceedings in the Court below. *Id.*
13. CLAIM.—PROCEEDINGS IN REM.—The party seeking to defend, in a proceeding *in rem*, in instance causes in Courts exercising admiralty jurisdiction, must file a claim to the property libelled. *Id.*
14. WHO MAY FILE CLAIM.—RECITALS IN CLAIM.—The claim must be filed by the owner, or some authorized agent, and must state the facts in a direct issuable form, and not by way of recitals. Course of proceedings indicated. *Id.*

PARTITION.

1. PARTITION OF REAL PROPERTY.—SUIT IN EQUITY FOR.—Where the legal title is not in dispute, a suit for partition of real property may be maintained in a Court of equity, although the equitable title to the whole premises is claimed by certain of the defendants and disputed by the complainants. *Lamb v. Burbank*, 227.

PARTNERS.

1. SURVIVING PARTNER ADJUDGED BANKRUPT.—A surviving partner will be adjudged bankrupt on an act of bankruptcy committed by him in the course of the administration of the assets of the dissolved partnership, notwithstanding that the separate estate of the deceased partner is sufficient to pay all his debts, joint and separate. *In re Sterens*, 397.
2. JOINT ASSETS TO BE TAKEN POSSESSION OF.—The messenger will in such case take possession of the joint assets in the hands of the bankrupt surviving partner, and also of his separate property. *Id.*

PATENT RIGHTS.

1. INFRINGEMENT OF PATENT.—Whenever a party avails himself of the invention of a prior patentee, without such variation as will constitute a new discovery, there is an infringement of such prior patent. *Carter v. Baker*, 512.
2. IDEM.—An infringement involves substantial identity. If the invention of the patentee is a machine, or an improvement on a machine, the patent will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of its mechanism, which performs the same service or produces the same effect, in the same, or substantially the same, way. *Id.*
3. CHANGE IN FORM NOT NECESSARILY A CHANGE IN SUBSTANCE.—The form or mechanical construction of a machine may be different from a prior machine, and the two still be, substantially, identical. The inquiry for the jury must, therefore, be, whether the defendant's device is, in substance and effect, a new and different thing, or a mere *colorable* evasion of the plaintiff's contrivance. *Id.*
4. COMBINATION, HOW INFRINGED.—Where the patent is for a combination of several parts before known and used in machinery, it is no infringement to use any of the parts, where the combination is not used, or any combination of some of the parts with another, or others, substantially different from the omitted parts. *Id.*

-
5. **MECHANICAL SUBSTITUTE IN COMBINATION.**—But if a well-known mechanical substitute for the omitted part has been used in combination with the other parts, there is an infringement; for such mechanical substitute for a thing must be regarded as the thing itself. *Id.*
 6. **MECHANICAL SUBSTITUTE DEFINED.**—Where, in mechanics, one device does a particular thing, or accomplishes a particular result, every other known device which skillful workmen know will do the same thing, or produce the same result, is a known mechanical substitute. *Id.*
 7. **EXPERTS.**—The testimony of experts is to be considered like any other testimony; is to be tried by the same tests, and receive just so much weight and credit as the jury may deem it entitled to, when viewed in connection with all the circumstances. *Id.*
 8. **MODELS AND MACHINES** rightly understood furnish very persuasive evidence on questions of improvement and infringement. *Id.*
 9. **IMPROVED MACHINES MAY INFRINGE.**—Although a machine may embrace a patentable improvement on a prior patented machine, yet if it embodies such prior machine, or the patented portion thereof, there is an infringement, and the patentee of the improvement cannot lawfully appropriate the prior invention, even though his own improvement is useless without such appropriation. *Id.*
 10. **GREATER USEFULNESS EVIDENCE.**—Greater usefulness is a circumstance to be considered by the jury on questions of infringement, but it is not conclusive. The point must be determined upon the whole evidence. *Id.*
 11. **MAKING MACHINE INFRINGEMENT.**—The mere making or selling of a patented machine, is an infringement which entitles the plaintiff to maintain an action. *Id.*
 12. **MEASURE DAMAGES.**—The actual damages sustained, directly resulting from the infringement, is the amount to be recovered. *Id.*
 13. **DAMAGES, HOW ASCERTAINED.**—The damages must be found from the evidence; not from mere conjecture without regard to evidence. *Id.*
 14. **PROFITS.**—The plaintiff is entitled to recover the profits realized by the wrong-doer from the infringement, as a part of the damages. *Id.*
 15. **CONFUSION OF RIGHTS.—BURDEN OF PROOF.**—If the party infringing has improved the machine, and a part of the profits are due to his improvement, the portion of the profits due to such improvement do not belong to the owner of the prior patent; but the burden of proof rests on the infringer to show what portion of the profits are due to his improvement. *Id.*
 16. **OTHER DAMAGES.**—The actual damages may be more than the actual profits realized by the infringer, as the infringer may have sold at a much lower price than the patentee would have been able, and entitled, to sell. If so, this circumstance should be considered, and the whole profits which the plaintiff would have realized, should be given. *Id.*
 17. **IDEM.—STOCK CARRIED OVER.**—So, also, the patentee may have been unable to sell machines manufactured, in consequence of the sales of the infringing party, and have, consequently, been compelled to carry them over. If so, the interest on the capital invested in the machines so carried over, is a proper element of damages to be considered. *Id.*

18. **TWO PATENTS.—DAMAGES APPORTIONED.**—Where the plaintiff, who patents a machine, and afterwards an improvement on the same machine—his machine put upon the market embodying both inventions—sues for an infringement of the first patent only, he is not entitled to recover, as damages, that part of the enhanced price of the machine, which is due to his second patent; and the burden of proof rests upon him to show how much of the price, or profits, are due to the patent infringed. *Id.*
19. **OTHER MACHINES AND PROFITS.**—Plaintiff is not entitled to recover, as a part of his damages, any loss sustained in consequences of an infringement of his patent by reason of his inability to sell *other* machines, than those embodying the infringed patent. The profits recovered must be the direct and legitimate fruits of the patent infringed. *Id.*
20. **PROFITS ON ENTIRE MACHINE RECOVERED.**—The plaintiff selected certain elements and combined them into a plow which he patented. The plow could only be used as an entirety—as one machine. He had the exclusive right to make, use and vend the machine as a whole: *Held*, that he is entitled to recover of an infringer the profits on the whole machine. *Id.*
21. **RECOVERY AGAINST WRONGFUL VENDOR OF PATENTED MACHINE.—EFFECT ON VENDEE.**—Where a patentee does not use the patented machine himself, nor establish a patent fee, but manufactures the patented article and sells at fixed prices, seeking his compensation in the profits of the manufacture and sale at such fixed prices, and another party infringes the patent by making and selling the patented article; and where the patentee sues the party so infringing, and claims to recover, and does recover, the full amount of profits, which he himself would have obtained on said articles, had he manufactured and sold them at his ordinary prices, by such claim and recovery he adopts the sale made by the party infringing, and the right to use the specific articles sold, and for which the recovery has been had, vests in the purchasers. *Spaulding v. Page*, 702.

PAWNBROKERS.

1. **PAWNBROKERS' TICKETS.**—The ticket given by a pawnbroker under the Statute of California is "an agreement or contract" within the meaning of section 170 of the Internal Revenue Act of 1864. *United States v. Smith*, 192.

PERJURY.

1. **PERJURY IN SWEARING TO INCOME RETURN.**—Although the act imposing a tax upon incomes (14 Stat. 479) makes no provision for *compelling* a person to make oath to his return of income, yet it *permits* him to do so, and if he avails himself of the privilege, and intentionally swears falsely, he is guilty of perjury. (13 Stat. 239.) *United States v. Smith*, 277.
2. **CORRUPT INTENT.—PERJURY.**—Although the affidavit of a party to his income return be false, he cannot be convicted of perjury thereon, unless it was made with a corrupt intention, and therefore, if such party, as a matter of law or fact, honestly believed that he was not bound to return any profits from the sale of stocks, for taxation, then, although he was mistaken and his affidavit in this respect is false, he cannot be convicted of perjury. *Id.*

3. **CORRUPT INTENT, QUESTION FOR JURY.**—Upon an indictment for perjury, whether the oath was knowingly and corruptly false, is a question for the jury, and the Court will not set aside their verdict thereon, unless it is clearly against the weight of evidence. *Id.*
4. **INTENT, QUESTION FOR JURY.**—Whether a false oath was taken under mistake as to the law or fact involved therein, is a question of fact for the jury. *Id.*
5. **PERJURY.—PUNISHMENT.**—The circumstances under and for which perjury was committed, considered with reference to the punishment proper to impose upon a party convicted thereof. *Id.*

PILOTS AND PILOT COMMISSIONERS.

1. **SECRETARY OF PILOT COMMISSIONERS, APPOINTMENT OF.**—Section 2 of the Oregon Pilot Act, as amended in 1868, provides that the Pilot Commissioners “may appoint a Secretary” and prescribes his duties: *Held*, that it is the absolute duty of the Commissioners to appoint such Secretary; and that parol evidence is not admissible to prove the meeting and action of such Commissioners concerning the licensing of a pilot, when the act requires a record of the same to be made by the Secretary. *The California*, 596.
2. **PILOT LICENSE, SIGNATURE OF COMMISSIONERS.**—A pilot license signed by all three of the Commissioners is *prima facie* evidence of the facts stated in it concerning the examination and licensing of the pilot to whom it purports to be granted; but if only signed by two of such Commissioners, the case is otherwise, unless it also appears from the minutes of the board that the matter was acted upon and the license granted at a meeting of the Commissioners when all three were present; or such license contains a direct recital or averment of such meeting and action in reference to such license. *Id.*
3. **IDEM.**—The power conferred upon a pilot commissioner by the act, is a personal trust to be exercised for the public good, and cannot be delegated to another; and therefore one of such Commissioners cannot authorize another to sign his name to the license, although it has been agreed or concluded between such Commissioners, that such license may be granted. *Id.*

PILOTAGE.

See **MARITIME LIEN**, 6.

PLEADING.

1. **EQUITABLE TITLE NO DEFENSE TO ACTION AT LAW.**—An equitable title is no defense to an action for possession by the holder of the legal title. *Stark v. Starr*, 15.
2. **EJECTMENT, DEFENDANT MUST PLEAD HIS TITLE.**—The Oregon Code (226) does not allow a defendant in ejectment to defeat the plaintiff, by giving in evidence any estate in himself or another in the property in controversy, unless the same be pleaded in his answer. *Id.*
3. **DEFENSES SEPARATELY PLEADED.**—Distinct defenses to a petition in bankruptcy should be separately pleaded. *In re Ouimette*, 47.

4. **SURPLUSAGE.**—A denial of the allegation in the petition respecting the insolvency of the respondent is a sufficient answer thereto, and a further statement as to the value of respondent's assets compared with the amount of his indebtedness, is surplusage and immaterial. *Id.*
5. **DEMURRER.—MOTION TO STRIKE OUT.**—A demurrer is not the proper mode of objecting to irrelevant or immaterial allegations, or the mingling in one plea of distinct defenses, but a motion to strike out. *Id.*
6. **DEFENSES MUST BE SEPARATELY PLEADED.**—In a petition in bankruptcy, the debt and the act of bankruptcy constitute the cause of action, and the defense thereto may go to either or both of these matters; but if there are several defenses, they must be separately pleaded. *Id.*
7. **PLEAS, WHEN MAY BE STRICKEN OUT.**—A plea false upon its face, may be stricken out, but this falsity cannot be shown by comparing it with another plea or defense in the same answer. *Bachman v. Everding*, 70.
8. **SAME.**—A plea which expressly, or in effect, admits the plaintiff's cause of action, cannot be stricken out as frivolous. *Id.*
9. **SAME.**—A motion to strike out is not allowed, if matter properly pleaded is included in it. *Id.*
10. **SEPARATE PLEAS CANNOT HELP OR DESTROY ONE ANOTHER.**—A defendant may plead separately as many distinct defenses as he may have, and one cannot be taken to help or destroy the other. *Id.*
11. **MARRIAGE WITH THE CIRCUMSTANCES SHOULD BE ALLEGED IN PLEADINGS.** Where a woman claims to have been the wife of another, it is an insuperable objection to such claim, that the pleadings do not contain an allegation of a marriage to such other, with the circumstance of time and place, and that she withholds her testimony as a witness upon the same point. *Holmes v. Holmes*, 99.
12. **ANSWER SHOULD STATE FACTS, NOT EVIDENCE.**—A defendant in ejectment should state in his answer the nature and duration of the estate he claims in the premises, if any, but not the evidence of it. (Or. Code, 226-7.) *Fitch v. Connell*, 156.
13. **EXHIBIT NO PART OF A PLEADING.**—An exhibit is no part of a pleading in an action at law; a record or instrument should be stated in a pleading either according to its tenor or legal effect.
14. **ERRORS IN PLEADING.—DUPLICITY.**—Duplicity in pleading is forbidden by both the common law and the Code as tending to prolixity and confusion, but under the Code objection to duplicity is to be made by a motion to strike out the pleading rather than by special demurrer as at common law. *McKay v. Campbell*, 374.
15. **IDEM.**—If a complaint contains more than one cause of action they must be separately stated or it will be liable to be stricken out for duplicity. *Id.*
16. **IN BANKRUPTCY COURT ALL PLEADINGS SPECIAL.**—In this Court all pleadings must be special, and therefore a mere general denial of the intent with which an act is alleged to have been done, is not a good defense to a charge of having committed an act of bankruptcy, but the respondent must also allege and prove with what intent he did the act complained of. *In re Silverman*, 410.

19. **GENERAL DENIAL OF UNLAWFUL INTENT, WHEN SUFFICIENT.**—But when the act complained of is not necessarily an act of bankruptcy, a general denial of the unlawful intent with which the act is alleged to have been done is sufficient to prevent judgment for want of an answer, and upon a trial, evidence of a lawful intent may be given thereunder. *Id.*
18. **WHEN NOT SUFFICIENT.**—When the unlawful intent is the necessary consequence of the act charged, as in the case of a payment of one creditor by an insolvent debtor, with knowledge of his insolvency, a mere denial of such intent is no answer to the petition, and judgment may be given against the respondent as upon a failure to answer. *Id.*
19. **IN ADMIRALTY.—ANSWERS.**—The general answer in admiralty should be pertinent and responsive to the narration or allegations in the articles of the libel, and if the response is not full, explicit and distinct, exceptions for insufficiency lie to compel a sufficient answer. *In re The California*, 463.
20. **SAME.**—But if the answer is responsive to the libel, no exceptions will lie to it, on the ground that it is not a defense to the suit, whether the matter is impertinent or not. *Id.*
21. **EXCEPTIONS.**—Exceptions in admiralty, nature and office of, defined.
22. **IMPERTINENCE.**—It is impertinence to blend matter intended as a defensive allegation, with the response or answer to an allegation of the libel. *Id.*

See JURISDICTION, 4; ADMIRALTY, 3, 4, 5, 6, 20; EQUITY, 2.

POSSESSION.

1. **CONSTRUCTIVE POSSESSION.**—A person seized in fee simple, has constructive possession of the premises of which he is seized, and will be presumed to be in the actual possession thereof, until the contrary appears. *Lamb v. Burbank*, 227.
2. **POSSESSION PRESUMED TO BE IN GOOD FAITH.**—A person in possession under color of title, who makes permanent improvements upon the property, is presumed to be acting in good faith until the contrary appears. *Starr v. Stark*, 15.
3. **POSSESSION.—PUBLIC LAND.**—As between individual citizens, rights to the possession of the public lands have been recognized and protected by the Courts of the Territories and new States, and of the United States, and acquiesced in by the Government. *Lamb v. Davenport*, 609.

See EJECTMENT, 5, 6, 7.

PRACTICE.

1. **GROUND FOR SETTING ASIDE VERDICT.**—A correct verdict should never be set aside on account of supposed or actual error in the process or means by which it was obtained. *United States v. Mathoit*, 142.
2. **BANKRUPTCY.—CREDITOR'S PETITION MAY BE AMENDED.**—Where the proofs disclose acts of bankruptcy not averred in the petition of the creditor, the petition may be amended so as to conform to the proofs. *In re Galinger*, 224.

See CRIMES AND CRIMINAL PROCEDURE; EJECTMENT, 1, 3; EQUITY, 1; INDICTMENT, 5, 6; NEW TRIAL.

PRESUMPTIONS.

See INTERNAL REVENUE, 5.

PROCESS.

1. SUBPOENA, SERVICE OF, UPON ATTORNEY.—In case of a bill in equity to stay proceedings at law or a cross-bill, where the plaintiff in the action at law or original bill is beyond the jurisdiction of the Court, the Court will order the subpoena to appear to be served upon the attorney of such absent plaintiff; but when the judgment in such action at law has been enforced, the authority of the attorney to represent the absent party is at an end, and such order will not be made. *Kamm v. Stark*, 547.

PROMISSORY NOTE.

1. PROMISSORY NOTE, WHEN NOT PAYMENT.—The mere delivery and receipt of the promissory note of the debtor or a third person does not constitute payment, but it must also appear that the creditor *expressly* agreed to take such note as payment. *In re Ouimette*, 48.
2. SAME.—Where the creditor took the promissory notes of third persons from his debtor upon an agreement that they should be considered as taken in payment, if *collectable*, such creditor is bound to use ordinary means and diligence to collect such notes, and, if necessary, he must sue upon them. *Id.*

PUBLICATION OF SUMMONS.

1. SERVICE BY PUBLICATION.—Where the statute authorizes service of a summons issued by a Court of record, to be made with respect to a specific subject matter, by publication, the Court issuing the summons has jurisdiction to determine the fact, whether the service has been properly made; and the determination is conclusive, when collaterally brought into quest on. *Galpin v. Page*, 309.

PUBLIC LAND.

1. RIGHT OF WAY.—STATUTE CONSTRUED.—The grant of the right of way to the plaintiff through the public lands of the United States, made by the second section of the Act of Congress of July 1, 1862, was a present grant, operating immediately upon the passage of the act, without reservation or exception, and was subject to no conditions except those which were subsequent, or necessarily such as that the road should be constructed within the period specified, and be afterwards maintained and used for the purposes designated. All acquisitions of land over which this right of way was thus granted, made subsequent to the passage of the act, were subject to the exercise of this right. *C. P. R. R. Co. v. Dyer*, 642.
2. *IDEM*.—The reservations and exceptions found in the third section of the above act apply only to the grants of the land therein mentioned, and do not apply to the grant of the right of way made in the second section. *Id.*
3. *IDEM*.—The provision of the seventh section of the above act requiring the plaintiff, within two years, to designate the general route of the road

as near as might be, and file a map of the same in the Department of the Interior, did not affect the grant of the right of way; it only furnished the means by which the Secretary could withdraw the lands within a specified distance of such designated route from preëmption, private entry and sale. *Id.*

See POSSESSION, 3; CONTRACT, 5, 8; ALCALDE GRANTS, 5, 6, 7, 8.

QUA TIMET.

1. **FORMER SUIT WHEN BAR TO ANOTHER.**—Where, in a suit to quiet title, one of the grounds of the relief sought is abandoned by the complainant because adjudged to be inconsistent with another ground of relief alleged in his complaint, and suit is finally determined adversely to the complainant, he is barred from maintaining another suit for the same relief upon such abandoned ground. *Starr v. Stark*, 270.
2. **ALL MATTERS AFFECTING TITLE DETERMINED.**—A suit to ascertain and quiet title under section 500 of the Code, extends to, and includes all the grounds of controversy between the parties as to the title to the premises; and by the final decree therein all matters affecting such title are determined. *Id.*
3. **A BAR TO OTHER SUITS FOR SAME RELIEF.**—A plaintiff in such suit cannot, at his option, split it up into many suits, and if he omits to set forth and prove all the grounds of his right, or his adversary's want of it, he cannot afterward bring another suit upon the fragment or portion of the case omitted. *Id.*

RATIFICATION.

See BANKRUPTCY, 43.

RECEIPT.

1. **SATISFACTION, PROOF OF.**—A receipt given by a seaman upon the payment of his wages, which contains a clause acknowledging satisfaction of all claims for assault and battery, is not binding unless shown to have been the result of a fair and free compromise or settlement for some substantial compensation or benefit to the seaman besides the payment of his wages. *Hanson v. Fowle*, 539.
2. **IDEM.**—A receipt for all "demands and dues" against a vessel, her master and officers, is not, upon its face, a receipt for assault and battery. *Id.*
3. **RECEIPT FOR CLAIMS EX CONTRACTU, AND CLAIMS EX DELICTO.**—The word "demand" on a receipt, ordinarily relates only to claims arising *ex contractu*, and not to those arising *ex delicto*. *Id.*

RES ADJUDICATA.

1. **FORMER SUIT WHEN BAR TO ANOTHER.**—Where, in a suit to quiet title, one of the grounds of the relief sought is abandoned by the complainant because adjudged to be inconsistent with another ground of relief alleged in his complaint, and such suit is finally determined adversely to the complainant, he is barred from maintaining another suit for the same relief upon such abandoned ground. *Starr v. Stark*, 270.

2. **ALL MATTERS AFFECTING TITLE DETERMINED.**—A suit to ascertain and quiet title under section 500 of the Code, extends to, and includes all the grounds of controversy between the parties as to the title to the premises; and by the final decree therein all matters affecting such title are determined. *Id.*
3. **A BAR TO OTHER SUITS FOR SAME RELIEF.**—A plaintiff in such suit cannot, at his option, split it up into many suits, and if he omits to set forth and prove all the grounds of his right, or his adversary's want of it, he cannot afterward bring another suit upon the fragment or portion of the case omitted. *Id.*

SAILOR, SEAMAN.

1. **DISSOLUTION OF CONTRACT WITH SEAMEN.—MASTER'S OBLIGATION.**—Where a seaman fails by his own fault to rejoin the ship at an intermediate port, at which she has touched in the course of the voyage, and she sails away without him, the master is not bound to reinstate him upon the return of the vessel to the same port in the course of her voyage. *Scully v. Great Republic*, 31.
2. **SUNDAY.—DUTY OF SEAMAN.—RIGHTS OF MASTER.**—A seaman has no right to refuse duty required of him on a Sunday, by our calendar, it appearing that at the port of Ounalaska, the day owing to a difference in the calendar, was not observed as a holiday; but the master had no right to expel him from the ship for such refusal. *Johnson v. The Barque Cyane*, 150.
3. **FISHING VESSELS.—RIGHTS OF SEAMAN.**—Where by the articles the crew of a fishing vessel were bound to make the fish, and on the arrival of the vessel the owners declined to allow them to do so, and the men remained by the vessel for nearly two months, all the time ready and willing to make the fish, and then left her and sued for their shares of the catch: *Held*, that their readiness and willingness to make the fish were equivalent to an actual performance of their contract; and that they were entitled to be paid their shares. Various charges made by the owners disallowed. *Goodrich v. The Barque Domingo*, 182.
4. **UNJUST AND UNEQUAL AGREEMENTS WITH SEAMEN DISREGARDED BY COURT OF ADMIRALTY.**—An agreement made between the master and the cook of a fishing vessel by which the latter agreed to renounce his wages, earned and to be earned, and to accept in lieu thereof the *catch* of one of the seamen, pronounced unequal and unjust and to be disregarded by a Court of Admiralty. *Somerville v. Brig San Francisco*, 390.
5. **ASSAULT AND BATTERY OF OFFICER, WHEN MASTER LIABLE FOR.**—A master of a vessel is liable for an unjustifiable assault and battery by one of his officers upon one of the crew, when the same is done by his connivance, consent or authority. *Hanson v. Fowle*, 539.
6. **IDEM.**—The consent and authority of the master will be presumed when it appears that he knew of the trespass or had reason to know it, and did not interfere to prevent it. *Id.*
7. **IDEM.—SATISFACTION, PROOF OF.**—A receipt given by a seaman upon the payment of his wages, which contains a clause acknowledging satisfaction of all claims for assault and battery, is not binding unless shown to

have been the result of a fair and free compromise or settlement for some substantial compensation or benefit to the seaman besides the payment of his wages. *Id.*

8. *IDEM.*—A receipt for all “demands and dues” against a vessel, her master and officers is not upon its face a receipt for assault and battery. *Id.*
9. RECEIPT FOR CLAIMS EX CONTRACTU, AND CLAIMS EX DELICTO.—The word “demand” on a receipt, ordinarily relates only to claims arising *ex contractu*, and not to those arising *ex delicto*. *Id.*
10. MEASURE OF DAMAGES.—Rules for assessment of damages in cases of beating and wounding a seaman. *Id.*

SALE.

1. INADEQUACY OF PRICE.—EFFECT ON SALE.—Mere inadequacy of price is not sufficient to set aside a sale, but when such inadequacy is so great that the mind revolts at it, the Court will lay hold of the slightest additional circumstance of advantage or oppression to rescind the contract. *Holmes v. Holmes*, 99.

See EXECUTION AND EXECUTION SALES, 1.

SALVAGE.

1. SALVAGE CONTRACT BY MASTER SUSTAINED.—A contract made by the master with salvors, for the recovery of the cargo of a sunken vessel sustained. *Harley v. 467 Bars R. R. Iron*, 1.
2. ADDITIONAL COMPENSATION REFUSED.—*Id.*

SAN JOSE.

1. STATUTE, CONSTRUCTION.—Where there are several statutes relating to the same general subject matter, and the meaning of the last is doubtful, they should all be examined together, and considered in connection with the circumstances which led to their passage, in order to ascertain the probable intent of the Legislature in respect to the doubtful point. *Le Roy v. Chabolla*, 456.
2. STATUTE CONSTRUED.—Section seventy-three of the Act of the Legislature of the State of California, to “Reincorporate the City of San José,” does not confirm, or render valid, the Sheriff’s sale of all the public lands of the Pueblo of San José, made in May, 1851, or the release of the title to said lands by the corporation to the purchasers thereunder, attempted to be made by an ordinance of the Common Council of the City of San José, approved November 10, 1851. *Id.*

SEIZURE.

See JURISDICTION, 3, 4, 5.

STATUTORY CONSTRUCTION.

1. STATUTE, CONSTRUCTION.—Where there are several statutes relating to the same general subject matter, and the meaning of the last is doubtful, they should all be examined together, and considered in connection with the circumstances which led to their passage, in order to ascertain the probable intent of the Legislature in respect to the doubtful point. *Le Roy v. Chabolla*, 456.

2. STATUTE CONSTRUED.—Section seventy-three of the Act of the Legislature of the State of California, to “Reincorporate the City of San José,” does not confirm, or render valid, the Sheriff’s sale of all the public lands of the Pueblo of San José, made in May, 1851, or the release of the title to said lands by the corporation to the purchasers thereunder, attempted to be made by an ordinance of the Common Council of the City of San José, approved November, 10, 1851. *Le Roy v. Chabolla*, 456.

STATUTES CONSTRUED.

1844.	Act of May 23.	Town Sites, (5 Stat. at Large, 657)	15
1854.	Act of July 17.	Public lands in Oregon, (10 Stat. at L. 305)	15
1850.	Act of Sept. 27.	Donation Act Oregon, (9 Stat. at L. 497)	15
1867.	Act of March 2.	Bankruptcy, (Sec. 20; 14 Stat. at L. 526)	41
1867.	Act of March 2.	Bankruptcy, (Sec. 23, 35, 39; 14 Stat. at L. 528)	56
1867.	Act of March 2.	Bankruptcy, (Sec. 20; 14 Stat. at L. 526)	73
1868.	Act of July 20.	Distilled Spirits, (Sec. 6, 7, 8, 46; 15 Stat. at L. 125.)	84
1867.	Act of March 2.	Bankruptcy, (Sec. 1; 14 Stat. at L. 517)	89
1868.	Act of July 20.	Distilled Spirits, (Sec. 44; 15 Stat. at L. 142, 150)	142
1868.	Act of July 20.	Same (Sec. 25, 45, 96; 15 Stat. at L. 125)	188
1864.	Act of June 30.	Internal Revenue, (Sec. 170; 13 Stat. at L. 297)	192
1850.	Act of Sept. 27.	Oregon Donation Act, (9 Stat. at L. 497)	253
1861.	Act of Aug. 5.	Internal Revenue, (12 Stat. at L. 309)	277
1867.	Act of March 2.	Internal Revenue, (14 Stat. at L. 479)	277
1867.	Act of March 2.	Bankruptcy, (Sec. 37; 14 Stat. at L. 528)	351
1870.	Act of May 31.	Civil Rights, Voting, (16 Stat. at L. 140)	374
1868.	XIV Amendment Constitution.	(15 Stat. at L. 709)	374
1870.	XV Amendment Constitution.	(16 Stat. at L. 1131)	375
1861.	Act July 13.	Duties on Imports, (Sec. 5; 12 Stat. at L. 257)	401
1862.	Proclamation of President, Aug. 16.	(12 Stat. at L. 1262)	401
1864.	Act June 30.	Internal Rev.. (Sec. 79; 14 Stat. at L. 121)	494
1867.	Act March 2.	Imprisonment for Debt, (14 Stat. at L. 543)	497
1842.	Act Aug. 23.	Judiciary, (5 Stat. at L. 517)	497
1868.	Act Feb. 25.	Parties as Witnesses, (15 Stat. at L. 37)	536
1862.	Act of July 16.	Witnesses Competency, (12 Stat. at L. 588)	531
1860.	Act of June 14.	Mexican Grants, (Sec. 6, 12 Stat. at L. 34)	562
1866.	Act of July 30.	Internal Revenue, (Sec. 9; 14 Stat. at L. 101)	605
1864.	Act of July, 1.	Pacific Railroad, (Sec. 2-7; 12 Stat. at L. 489)	642
1864.	Act of July 1.	Land Titles, California, (Sec. 5; 13 Stat. at L. 333)	659
1866.	Act of March 8.	Quiet Titles San Francisco, (14 Stat. at L. 4)	660
1866.	Act of July 13.	Internal Revenue, (Sec. 110; 14 Stat. at L. 136-7.)	696
1860.	Act of June 22.	Consular Courts, (12 Stat. at L. 72)	714
1870.	Act of July 1.	Consular Courts, (Sec. 5, 6; 16 Stat. at L. 183-4)	714

STOCKHOLDERS.

See CORPORATIONS.

STREET ASSESSMENTS.

1. STREET ASSESSMENTS MAY BE SET OFF AGAINST MESNE PROFITS.—It is the duty of a party in possession of property, claiming title or interest

therein, to pay the taxes and charges imposed thereon, and therefore an assessment for street improvement paid by a defendant in an action for mesne profits, is a proper deduction from the gross value of the rents of the property, in estimating the actual damage which the plaintiff has sustained, by the defendants withholding of the possession. *Stark v. Starr*, 15.

2. STREET IMPROVEMENT NOT AN IMPROVEMENT ON THE PROPERTY.—A street improvement is not an improvement made on the property, upon which the assessment was made for such improvement, and therefore the value of it cannot be set off by the occupant against a claim for mesne profits. *Id.*

SUFFRAGE, RIGHT OF.

1. CONSTRUCTION OF XVTH AMENDMENT.—Under the XVth amendment to the Constitution and the act of May 31, 1870 (16 Stat. 140), to enforce it, all persons declared citizens of the United States by the XIVth amendment are entitled to vote in the States where they reside, at all elections by the people, without distinction of race, color or previous condition of servitude; but the several States, notwithstanding the amendment, have the power to deny the right of suffrage to any citizens of the United States on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civic duties, crime or other cause not specified in the amendment. *McKay v. Campbell*, 374.
2. IDEM.—The power of Congress over the subject of the right to vote in the several States is conferred by the XVth amendment and is confined to the enforcement of such amendment, by preventing the State from discriminating between citizens of the United States in the matter of the right to vote, on account of race, color or previous condition of servitude. *Id.*
3. RIGHT TO VOTE UNDER LAW OF OREGON.—Under the law of Oregon when a person offers to vote and is duly challenged, thereafter his right to vote depends upon his taking the oath that he is a qualified elector as prescribed in Section 13 of the election law (Or. Code, 700), and it then becomes the duty of the judges of election to tender him such oath, and administer it to him, if he is willing to take it. *Id.*
4. IDEM.—The taking of this oath by the party offering to vote after he is challenged, is a necessary prerequisite to the right to vote within the meaning of Section 2 of the Act of Congress aforesaid, and a refusal or omission upon the part of the judges to give such party an opportunity to take it, is a violation of such section, if the same be done on account of his race, color, or previous condition of servitude, but not otherwise. *Id.*
5. IDEM.—PENALTY.—In an action to recover a penalty under Section 2 of the Act of Congress aforesaid, it must appear from the complaint, that the plaintiff was a citizen of the United States, and otherwise qualified to vote at the time and place mentioned in the complaint; and that the defendant refused or knowingly omitted to furnish the plaintiff an opportunity to become qualified to vote, as by refusing or knowingly omitting to swear the plaintiff to his qualifications as an elector, when the law of the State made it his duty so to do, and that such refusal or omission was on account of the race, color or previous condition of servitude of plaintiff. *Id.*

SUNDAY.

See **SAILOR**, 2.

SUPPLIES FOR VESSEL.

See **MARITIME LIEN**.

TENANT IN COMMON.

1. **DEED BY TENANT IN COMMON, GOOD AGAINST HIMSELF.**—A deed by a tenant in common for his interest in a particular part of the land held in common, although void as against his co-tenants, is good against himself and those claiming under him. *Lamb v. Wakefield*, 251.
2. **IDEM.**—A deed by which Daniel H. bargained, sold, etc., all his right, title, interest, claim and demand to Block 252 in the city of Portland, only passed to the purchaser the one fifth interest in the premises which Daniel H. then had. *Id.*

TENDER.

1. **TENDER NO DEFENSE TO PETITION IN BANKRUPTCY.**—A plea of tender can, under no circumstances, be a defense to a petition to have a debtor adjudged a bankrupt. *In re Ouimette*, 48.

TITLE, COLOR.

1. **COLOR OF TITLE.**—Color of title is only the appearance of title, and therefore it matters not whether the grantor in a deed had any title or not, if it appears from the face of such deed, when compared with the law regulating the subject, that he might have had title, his formal conveyance gives color of title to possession, taken or held under it. *Stark v. Starr*, 151.
2. **POSSESSION PRESUMED TO BE RIGHTFUL.**—Possession is presumed to be rightful until the contrary appears, and therefore adverse to the title of any other claimant; and this rule extends to the case of a vendee as against his vendor after the performance of the conditions of purchase by the former. *Id.*
3. **COVENANT IN DEED AGAINST ACTS OF GRANTOR.**—A covenant in a deed “against the claims of all persons claiming by, through or under the grantors,” only operates upon the estate in the granted premises which the covenantor then had. *Lamb v. Burbank*, 227.
4. **SAME.**—Such a covenant only refers to the existing title or interest granted, and does not bar the covenantor from claiming the same premises against his own covenantee or grantee by an after acquired title. *Id.*
5. **COVENANT FOR FURTHER ASSURANCE.**—A covenant in a deed, that if “the grantors obtain title from the United States, they will convey the same to the grantees by deed of general warranty, is a covenant for further assurance, and entitles such grantees, when the contingency happens, to such conveyance of the legal title. *Id.*

See **EXECUTION**, 1.

TOWN SITE ACT.

See **EJECTMENT**, 2.

TRUSTS.

1. PILOT COMMISSIONERS.—The power conferred upon a pilot commissioner by the act is a personal trust to be exercised for the public good, and cannot be delegated to another; and therefore one of such Commissioners cannot authorize another to sign his name to the license, although it has been agreed or concluded between such Commissioners, that such license may be granted. *The California*, 596.
2. BENEFICIARY OF TRUST.—When he may sue in equity in his own name. *Lamb v. Davenport*, 609.

See CONTRACT, 8.

USAGE.

1. USAGE PROVED.—A usage in the grain trade in California to deliver barley in sacks may be shown, when nothing is said in the contract as to the mode of delivery. *United States v. Robinson*, 219.

VAN NESS ORDINANCE.

8. VAN NESS ORDINANCE.—The adverse interest of the Government to the lands within the corporate limits of 1851 being released by the act of July 1st, 1864, the titles conferred by the Van Ness Ordinance became perfect legal titles. The act operated upon such titles as effectually as a patent would have done, and the right reserved to the United States did not affect the perfect character of those titles. *Montgomery v. Bevans*, 654.

VERDICT.

5. GROUND FOR SETTING ASIDE VERDICT.—A correct verdict should never be set aside on account of supposed or actual error in the process or means by which it was obtained. *United States v. Mathoit*, 142.

VOTE AND VOTING.

See SUFFRAGE, RIGHT OF.

VESSEL.

1. INSUFFICIENCY OF TACKLE AND APPAREL.—A deduction from the monthly hire will be made, where the voyage has been protracted by reason of the insufficiency of the sails, etc. *Haggett v. Bowman*, 4.
2. COLLISION, APPORTIONMENT OF DAMAGES.—Collision between a steamboat and vessel at anchor, in a fog. Damages apportioned, it appearing the vessel had neither a bell nor a fog-horn, and that the steamer failed to moderate her speed. *Morrison v. Steamboat Petaluma*, 126.
3. LIGHTS REQUIRED BY LAW MUST BE DISPLAYED.—A claim for damages by collision rejected; it appearing that the injured vessel omitted to display the lights required by law. *Larco v. Schooner Martha*, 129.
4. LIEN ON VESSEL FOR SUPPLIES.—The maritime law does not give a lien upon a vessel for supplies furnished at the home port. *The Mary Bell*, 135.
5. HOME PORT OF VESSEL.—The residence of the owner is the home port of a vessel, although she may be enrolled elsewhere; the enrollment is only *prima facie* proof of the owner's residence, and therefore of the home port. *Id.*

6. **SUPPLIES FURNISHED VESSEL IN FOREIGN PORT.**—To whom or what credit presumed to be given. *Id.*
7. **SAME WHEN BILL MADE OUT AGAINST VESSEL AND OWNERS.**—When a bill for supplies is made out against the vessel by name and the owners, it is evidence that credit was given to the vessel, and that the personal responsibility of the owners was not exclusively relied upon. *Id.*
8. **SEIZURE NECESSARY.**—There must be an actual seizure before any judicial proceedings are instituted, to condemn a vessel for violation of the navigation laws of the United States. *The United States v. The Fideliter*, 153.
9. **SEIZURE MUST BE ALLEGED.**—A seizure is a jurisdictional fact, and must be alleged in a libel to condemn a vessel for violation of the navigation laws of the United States. *Id.*
10. **OBJECTION FOR WANT OF SEIZURE, WHEN TAKEN.**—If a seizure is not alleged in the libel, the objection may be taken for the first time in the Appellate Court. *Id.*

See COMMON CARRIER, 1, 2; SAILOR, 3.

VOID AND VOIDABLE.

See EXECUTION AND EXECUTION SALES, 1; JUDGMENT AND DECREE, 3, 4, 5;
MARRIAGE, 3.

WASTE.

1. **TENANTS' LIABILITY FOR WASTE.**—In the absence of some agreement to the contrary, the tenant is responsible for all waste, however, or by whomsoever committed, except it be occasioned by act of God, the public enemy, or the act of the reversioner himself. *Parrott v. Barney*, 423.
2. **LIABILITY, PUBLIC POLICY.**—The liability of tenants for waste does not depend on negligence, but is imposed on grounds of public policy. *Id.*
3. **COVENANT, WAIVER, ETC.**—A covenant in a lease to surrender the premises at the expiration of the term in as good condition as the reasonable wear thereof will permit, damages by the elements excepted, does not protect the tenant from liability for waste, resulting from accidents occurring without his fault. *Id.*
4. **IDEM.**—A covenant in a lease requiring the tenant to occupy the premises for a specific purpose, as an express office, does not impose on the landlord, and exempt the tenant from, all the risks incident to such business, not resulting from the wrongful acts or negligence of the tenant. *Id.*
5. **WASTE IN APARTMENTS.**—Waste may be committed by a tenant of a portion of a building. *Id.*
6. **ACCIDENTS.—LIABILITY FOR DAMAGES TO ADJOINING PREMISES.**—Defendants are expressmen carrying packages between New York and California. A wooden case containing nitro-glycerine was delivered to defendants at New York, to be carried to Los Angeles, California, in the ordinary mode, and in the ordinary course of business. No questions were asked, and no information given, as to its contents. On arriving at San Francisco, a liquid resembling oil appeared to be leaking from the case, and it was taken to the office of defendants, the premises leased from plaintiff, for

examination. While under examination it exploded, injuring the premises occupied by defendants, and other premises of the plaintiff leased to, and occupied by, other parties. Defendants had no knowledge of, and no reason to suspect, the dangerous character of the contents, and there was, under the circumstances, no negligence on their part: *Held*, that defendants were not liable for the damage resulting from the accident to plaintiff's premises, occupied by other parties adjoining the premises held and occupied by defendants, but were liable for waste resulting to the premises occupied by themselves. *Id.*

WATER.

1. **WRONGFUL DIVERSION OF WATER.**—Plaintiff, in excavating a tunnel in a mountain to its mining claim, on the public lands of the United States, struck a subterranean flow of water, which it appropriated and enjoyed for several years. Defendants ran a tunnel from a distant point into the mountain, to a point some thirty feet in altitude, directly below the point where the plaintiff obtained the said water; and, thereupon, the water, which before flowed through plaintiff's tunnel, was intercepted and discharged through defendant's tunnel, and by them appropriated to their own use: *Held*, that said diversion and appropriation of the water was wrongful, and that complainant was entitled to an injunction. *Cole S. M. Co. v. V. & G. H. W. Co.*, 470.
2. **PRELIMINARY MANDATORY INJUNCTION.**—Where defendants, by means of a tunnel run into a mountain at a lower altitude than complainant's tunnel, wrongfully intercept water appropriated by complainant, flowing in its said tunnel, and divert it therefrom, a preliminary injunction will be granted, restraining the continuance of said diversion, even though an obedience to the injunction should render it necessary for defendants to build a bulkhead, or dam, across the tunnel. *Id.* and 686.

WIFE.

1. **RIGHT OF ACTION NOT TO SURVIVE TO WIFE.**—A chose in action accruing to a woman during coverture survives to her, unless the husband reduce it to his exclusive possession during his lifetime; therefore, when a legacy was given to the wife, and she and her husband joined in a power of attorney authorizing O., to collect and receive the same for her use and benefit, the receipt of the money by O., during the life of the husband was not the possession of the latter, except for the use of the wife, and the right to recover the same from O., survived to her. *Chappelle v. Olney*, 401.

WITNESS.

1. **WITNESS COMMITTING HIMSELF.**—Under the act of February 25, 1868 (15 Stat. 37), a person may be compelled in a judicial proceeding to testify to matters tending to criminate himself, but no use can be made of such testimony against the witness in a criminal proceeding. *United States v. Brown*, 531.

as near as might be, and file a map of the same in the Department of the Interior, did not affect the grant of the right of way; it only furnished the means by which the Secretary could withdraw the lands within a specified distance of such designated route from preemption, private entry and sale. *Id.*

See POSSESSION, 3; CONTRACT, 5, 8; ALCALDE GRANTS, 5, 6, 7, 8.

QUA TIMET.

1. **FORMER SUIT WHEN BAR TO ANOTHER.**—Where, in a suit to quiet title, one of the grounds of the relief sought is abandoned by the complainant because adjudged to be inconsistent with another ground of relief alleged in his complaint, and suit is finally determined adversely to the complainant, he is barred from maintaining another suit for the same relief upon such abandoned ground. *Starr v. Stark*, 270.
2. **ALL MATTERS AFFECTING TITLE DETERMINED.**—A suit to ascertain and quiet title under section 500 of the Code, extends to, and includes all the grounds of controversy between the parties as to the title to the premises; and by the final decree therein all matters affecting such title are determined. *Id.*
3. **A BAR TO OTHER SUITS FOR SAME RELIEF.**—A plaintiff in such suit cannot, at his option, split it up into many suits, and if he omits to set forth and prove all the grounds of his right, or his adversary's want of it, he cannot afterward bring another suit upon the fragment or portion of the case omitted. *Id.*

RATIFICATION.

See BANKRUPTCY, 43.

RECEIPT.

1. **SATISFACTION, PROOF OF.**—A receipt given by a seaman upon the payment of his wages, which contains a clause acknowledging satisfaction of all claims for assault and battery, is not binding unless shown to have been the result of a fair and free compromise or settlement for some substantial compensation or benefit to the seaman besides the payment of his wages. *Hanson v. Fowle*, 539.
2. **IDEM.**—A receipt for all "demands and dues" against a vessel, her master and officers, is not, upon its face, a receipt for assault and battery. *Id.*
3. **RECEIPT FOR CLAIMS EX CONTRACTU, AND CLAIMS EX DELICTO.**—The word "demand" on a receipt, ordinarily relates only to claims arising *ex contractu*, and not to those arising *ex delicto*. *Id.*

RES ADJUDICATA.

1. **FORMER SUIT WHEN BAR TO ANOTHER.**—Where, in a suit to quiet title, one of the grounds of the relief sought is abandoned by the complainant because adjudged to be inconsistent with another ground of relief alleged in his complaint, and such suit is finally determined adversely to the complainant, he is barred from maintaining another suit for the same relief upon such abandoned ground. *Starr v. Stark*, 270.

2. **ALL MATTERS AFFECTING TITLE DETERMINED.**—A suit to ascertain and quiet title under section 500 of the Code, extends to, and includes all the grounds of controversy between the parties as to the title to the premises; and by the final decree therein all matters affecting such title are determined. *Id.*
3. **A BAR TO OTHER SUITS FOR SAME RELIEF.**—A plaintiff in such suit cannot, at his option, split it up into many suits, and if he omits to set forth and prove all the grounds of his right, or his adversary's want of it, he cannot afterward bring another suit upon the fragment or portion of the case omitted. *Id.*

SAILOR, SEAMAN.

1. **DISSOLUTION OF CONTRACT WITH SEAMEN.—MASTER'S OBLIGATION.**—Where a seaman fails by his own fault to rejoin the ship at an intermediate port, at which she has touched in the course of the voyage, and she sails away without him, the master is not bound to reinstate him upon the return of the vessel to the same port in the course of her voyage. *Scully v. Great Republic*, 31.
2. **SUNDAY.—DUTY OF SEAMAN.—RIGHTS OF MASTER.**—A seaman has no right to refuse duty required of him on a Sunday, by our calendar, it appearing that at the port of Ounalaska, the day owing to a difference in the calendar, was not observed as a holiday; but the master had no right to expel him from the ship for such refusal. *Johnson v. The Barque Cyane*, 150.
3. **FISHING VESSELS.—RIGHTS OF SEAMAN.**—Where by the articles the crew of a fishing vessel were bound to make the fish, and on the arrival of the vessel the owners declined to allow them to do so, and the men remained by the vessel for nearly two months, all the time ready and willing to make the fish, and then left her and sued for their shares of the catch: *Held*, that their readiness and willingness to make the fish were equivalent to an actual performance of their contract; and that they were entitled to be paid their shares. Various charges made by the owners disallowed. *Goodrich v. The Barque Domingo*, 182.
4. **UNJUST AND UNEQUAL AGREEMENTS WITH SEAMEN DISREGARDED BY COURT OF ADMIRALTY.**—An agreement made between the master and the cook of a fishing vessel by which the latter agreed to renounce his wages, earned and to be earned, and to accept in lieu thereof the *catch* of one of the seamen, pronounced unequal and unjust and to be disregarded by a Court of Admiralty. *Somerville v. Brig San Francisco*, 390.
5. **ASSAULT AND BATTERY OF OFFICER, WHEN MASTER LIABLE FOR.**—A master of a vessel is liable for an unjustifiable assault and battery by one of his officers upon one of the crew, when the same is done by his connivance, consent or authority. *Hanson v. Fwale*, 539.
6. **IDEM.**—The consent and authority of the master will be presumed when it appears that he knew of the trespass or had reason to know it, and did not interfere to prevent it. *Id.*
7. **IDEM.—SATISFACTION, PROOF OF.**—A receipt given by a seaman upon the payment of his wages, which contains a clause acknowledging satisfaction of all claims for assault and battery, is not binding unless shown to

Stanford Law Library



3 6105 063 915 750

